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IN THE

Supreme Court of the United States

No. 408

ORZELL BILLINGSLEY, SR., C. HERBERT OLIVER, J. S. PHIFER and ABRAHAM WOODS, JR. for themselves, jointly and severally, and for all others similarly situated,
Petitioners,

versus

GEORGE W. CLAYTON, as President of the Jury Board of Jefferson County, Alabama; MRS. FRED BATSON, as Vice President of the Jury Board of Jefferson County, Alabama; WALTER E. PALMER, as Associate Member of the Jury Board of Jefferson County, Alabama; JAMES F. CHEATWOOD, as Clerk of the Jury Board of Jefferson County, Alabama; and each of their successors in office,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE
FIFTH CIRCUIT

ORZELL BILLINGSLEY, JR.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1966

No. _____

ORZELL BILLINGSLEY, SR., C. HERBERT OLIVER, J. S. PHIFER and ABRAHAM WOODS, JR. for themselves, jointly and severally, and for all others similarly situated,

Petitioners,

versus

GEORGE W. CLAYTON, as President of the Jury Board of Jefferson County, Alabama; MRS. FRED BATSON, as Vice President of the Jury Board of Jefferson County, Alabama; WALTER E. PALMER, as Associate Member of the Jury Board of Jefferson County, Alabama; JAMES F. CHEATWOOD, as Clerk of the Jury Board of Jefferson County, Alabama; and each of their successors in office,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on April 5, 1966.

CITATIONS TO OPINIONS BELOW

The Opinion and Order of the United States District Court for the Northern District of Alabama on motion for a temporary restraining order or preliminary injunction entered on June 7, 1962, printed in Appendix A hereto, *infra*, pp. 29-39, is unreported. Additional Findings of Fact and Conclusions of Law entered by the District Court on December 2, 1964, printed in Appendix A hereto, *infra*, pp. 40-42, is unreported. The opinion of the United States Court of Appeals for the Fifth Circuit, printed in Appendix A hereto, *infra*, pp. 42-64, is reported in 359 F. 2d 13. The judgment of that court is printed in Appendix A hereto, *infra*, p. 64.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 5, 1966 (R. 504). An order extending the period of time for filing this petition to and including August 3, 1966 was entered by the Court on July 2, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether *Swain* v. *Alabama*, 380 U.S. 202 (1965) raised or otherwise altered the standard or kind of proof necessary to make a *prima facie* case of the systematic exclusion of Negroes from grand and petit jury service?

2. Whether proof of the racial identity of those persons whose names are contained on jury rolls (52,000 persons) is required to make a *prima facie* case of the

systematic exclusion of Negroes from grand and petit jury service?

3. Whether in the Bessemer Division of Jefferson County, Alabama, where 39% of the eligible jury population is Negro and grand jurors are selected at random from a jury box containing 8892 names, yet after 68 consecutive drawings but one Negro is selected for service on a grand jury — one of 1224 persons — and none have served on a petit jury, a *prima facie* case of the systematic exclusion of Negroes from grand and petit jury service has been made?

4. Whether when a house-to-house canvass system is utilized in obtaining the names of 52,000 persons for jury duty, all canvassers being members of the white race, and the Jury Board's records and work papers have been destroyed and the jury rolls contain no racial identification, the burden of providing the racial identity of those persons whose names are on jury rolls falls to the state after a substantial disparity between the numbers of names of Negroes and whites drawn from jury boxes has been demonstrated?

5. Whether plaintiffs proved the systematic exclusion of Negroes from jury rolls in Jefferson County, Alabama in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States?

6. Whether in an action against members of a jury board after the making of a *prima facie* case under the rule of exclusion it is necessary for the private litigant to prove that judges, sheriffs or other court officials have neither excused nor failed to summon nor other-

wise discriminated in the jury selection process prior to the exercise of challenges for cause, strikes or peremptory challenges, or does the duty of explaining the disparity fall to the defending state officials?

STATUTES INVOLVED

The statutory provisions involved are Sections 3, 20, 21, 24, 25, 30, 33-38, 47-51 and 72 of Title 30, Alabama Code (Recomp. 1958), Section 11 of Title 35, Alabama Code (Recomp. 1958), and Sections 199-202, and 228 of Title 62, Alabama Code of 1940 (Recomp. 1958). They are printed in Appendix B hereto, *infra*, pp. 65-79.

STATEMENT

The proceedings

On April 26, 1962, the plaintiffs,[1] Negro residents of the Birmingham and Bessemer Divisions of Jefferson County, Alabama, filed this class action. The defendants are the members and clerk of the Jury Board of Jefferson County, Alabama ("Jury Board"). Jurisdiction was invoked under Title 28 U.S.C. Section 1343 (3), Title 42 U.S.C. Sections 1981 and 1983 and the Fifth and Fourteenth Amendments of the Constitution of the United States. (R. 3,4-5)

The plaintiffs alleged that in the selection of names for jury service the Jury Board used irregular and arbitrary methods (contrary to the Constitution and

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[1]Plaintiff Billingsley was also a party to a civil action then pending in the Circuit Court of the Tenth Judicial Circuit (Jefferson County) Alabama. (R. 8-9)

laws of Alabama and the United States) and systematically excluded Negroes. (R. 8)

They sought a declaration pursuant to 28 U.S.C. Section 2201 that the Board's policy, custom or usage in excluding qualified Negroes from jury rolls and boxes is in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States. (R. 11.) They also sought to enjoin the Jury Board *"and all persons in active concert and participation with them"* from failing or refusing to include in their selection the names of Negroes otherwise qualified for jury duty and from using the names then used until the names of all qualified Negroes had been included (R. 11-2).

They sought a temporary restraining order (R. 10, 13-4) and preliminary (R. 10, 14-5) and permanent (R. 10) injunctions. A hearing was held on May 16, 1962 (R. 21), the court taking the matter under advisement (R. 22).

On June 7, 1962, the Court declined — without prejudice to a final decree — to issue a temporary restraining order (R. 22) (See Opinion and Order, Appendix A, *infra*, pp. 29-39).

On November 2, 1964, a final hearing was held (R. 34). The court entered judgment against the plaintiffs on December 2, 1964 (R. 34-7 at 37) finding additional facts and adopting the opinion previously filed on motion for a temporary restraining order. (See Additional Findings of Fact and Conclusions of Law; Appendix A, *infra*, pp. 40-42).

On December 16-17, 1965, this case was argued with

six others[2] before the United States Court of Appeals for the Fifth Circuit *en banc*.

The Jury Board and Its Selection Techniques.

The three members of the Jury Board:

a. Generally supervise the clerk (R. 150, 158, 160, 162, 186-9)

b. Know few or no Negroes (R. 151, 155-6, 191, 478)

c. The two male members are retired (R. 43, 185)

d. Have suggested the names of white persons for jury duty but have suggested the names of no Negroes (R. 149-50, 190-2)

e. Use the same juror selection techniques in the Birmingham and Bessemer Divisions of Jefferson County (R. 464-5)

The Jury Board relies on a house-to-house survey to obtain the names of persons to be placed on jury rolls (R. 82-3, 92, 149, 152-3, 278, 283-4, 371, 436.) Phone books, the city directory, tax records; letters and visits to storeowners and postmasters are also sometimes employed (R. 45-48, 92-93, 337-9, 436). But primary reli-

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[2] *Scott* v. *Walker*, 358 F. 2d 561 was decided March 31, 1966. The instant case was decided April 5, 1966. *Davis* v. *Davis, Governor* No. 21976 (5th Cir. 1966) (as yet unreported) was decided May 31, 1966; *Rabinowitz* v. *United States*, No. 21256 (as yet unreported) and *Jackson* v. *United States*, No. 21345 (as yet unreported) were decided in a consolidated opinion on July 20, 1966). No decision has been rendered in *Labat* v. *Poret*, No. 22218 and *Brooks* v. *Beto*, No. 22809.

ance is placed on the personal canvass of neighborhoods (R. 371). The voter registration list has never been used (R. 91), tax rolls are relied upon rarely (R. 92) and the city directory is used for corrections and spelling (R. 92). Store people and postmasters are consulted in rural areas (R. 304, 372).

The conduct of the survey is in the hands of the clerk of the Jury Board. For a number of years J. F. Cheatwood served in this capacity (R. 82, 277, 435). He utilized five to nine assistants to make the survey; each was a white woman (R. 89-90, 293, 342-3). The Jury Board attempts by use of its techniques to obtain a fair representation — an economic and racial "cross-section" of the population — for jury duty (R. 277, 284, 295, 311). Despite this neither Mr. Cheatwood nor his assistant (later his successor) (R. 367-8, 435) knew:

a. What percentage of a precinct was surveyed (R. 294)

b. The percentage of Negroes and whites on jury lists (R. 85, 312)

c. The Negro communities he went to in Bessemer (R. 376)

d. Negro people personally (R. 351, 381-2, 444)

e. The time spent in a Negro community visited and remembered (R. 384)

f. The amount of time spent in Negro and white neighborhoods (R. 442).

Although work sheets employed by canvassers do not designate race (R. 290) they are not retained (R. 84). Jury rolls prior to 1953 have been burned (R. 54-5, 86). Present jury rolls contain no racial designations (R. 56-7, 88, 447); nor do jury cards (R. 400, 406-7, 432-3).

Names contained on past jury lists are brought forward and used in succeeding lists (R. 55, 91). When a person has actually served his name is removed for two years (R. 90, 91).

The procurement of names of Negroes and whites is handled differently. The methods employed are racially determined. For example:

Letters. The Jury Board sent letters to Negroes asking them to suggest names for inclusion on jury lists but did not use letters to obtain the names of whites (R. 57, 61, 303, 339, 436). There was difficulty obtaining Negro but not white names so letters were mailed only to Negroes (R. 295, 303). Of 88 letters mailed to Negroes only 9 replies were received (R. 322-3). The mailed form requests the precinct number, the name, and residence and business addresses, the occupation, place and date of birth of the person suggested for jury duty (R. 337-8). This technique was employed even though the Jury Board knew it was not effective in providing the names of Negroes (R. 340-2). At the first hearing (in 1962) a Negro attorney stated that the next time a letter came he'd send in 50,000 names, Mr. Cheatwood then stating that he thought the letters would now be effective (R. 346). At the time of the second hearing (in 1964) Negro attorneys were no longer on the mailing list (R. 437). No

question of the legality or illegality of attorneys suggesting names of prospective jurors had been considered. And the practice of mailing letters to Negroes was continued — but not to Negro lawyers (R. 436-7).

Volunteers. Thousands of whites have volunteered for jury duty by coming to the Jury Board office. Only 2 Negroes have done so (R. 349). White groups assist the Jury Board but Negro professional people have never been consulted nor has their assistance been sought (R. 347).

Publicity. Although articles appeared in the Birmingham daily papers concerning jury service they did not appear in Negro papers, the Jury Board seeking no publicity there (R. 344).

The house-to-house survey. The white ladies employed by the clerk to conduct the survey are obtained from the Personnel Board of Jefferson County (R. 90). Thirteen to fourteen months are spent making the survey (R. 293).

There is more difficulty in obtaining the names of Negroes than whites (R. 303, 305-9, 327-9). In back alleys the canvasser may have to walk five or six blocks to obtain two or three names (R. 328-9). And Negroes are more suspicious and won't come to the door (R. 305-6). "When they refuse to answer the question I say thank you and walk off," said the clerk. "I am not out there to argue with any of the citizens" (R. 307). Fifty percent of the cards which are left with white people are re-

turned; less than 5 percent of those left with Negroes are returned (R. 327-8).

The white women employed by the Jury Board are not allowed to go into "back alleys" the clerk covering these areas himself (R. 343, 449-50). Indeed the clerk and one other white man cover the Negro areas (R. 343, 369-70, 380-1). None of the white ladies go into the Negro community (R. 369-70). They don't go into rough areas, slum areas, where the homes are in bad repair, the porches are falling off and there are vicious dogs (R. 439, 440).

Despite the difficulty encountered in obtaining the names of Negroes for jury service the entire staff of the Jury Board is white (R. 375, 440). The clerk did not know if Negro personnel would help (R. 339). And never tried to hire any Negro ladies (R. 442). Once a letter was sent to a Negro it was not felt necessary to call on him personally since "that would be a lot of trouble" and "costing double" (R. 59). Letters mailed to the Negro attorneys in this case resulted in "nair" a name back (R. 61-2). In the higher Negro income areas the personal survey is effective but names do not come back from the letters (R. 84, 308).

Work sheets are checked by the clerk (there is no quota) some canvassers getting 30 to 40 names, others 70 to 80 (R. 311). In a congested area the clerk says he can cover 300 to 400 houses on foot per day (R. 345). When no one is home he leaves cards for the owner to fill out and return to the Jury Board (R. 441).

The Jury Board employs the same policy in the Birmingham and Bessemer Divisions of Jefferson County (R. 441, 464-5).

The Random Proceaures Followed in the Selection of Names of Jurors from the Jury Box in Jefferson County, Birmingham Division.

Cards on which are written the names of prospective jurors are drawn from the big jury box (a heavy steel box on rollers) (R. 111-2) by the presiding judge. The cards are then taken to the Circuit Clerk's office, he draws up the list of jurors and gives it to the sheriff who executes subpoenas requiring prospective jurors to report to the jury assembly room on the 5th floor of the court house (R. 203, 231). The clerk and the judge who organizes the jury enter the jury assembly room and the judge swears them in. The jury is then in the charge of the jury room bailiff (R. 232).

Within an hour the cards containing the names of jurors are placed in "a small black tin box" (R. 112, 232, 235) and a mimeographed list of the names of persons on the jury venire is drawn (R. 232).

No racial designations are on the cards or the list and the names themselves are kept secret until 10:30 a.m. on Monday morning when they are made public (R. 232-3).

At 9:00 a.m. on Mondays the docket is sounded, cases announced ready are sent to the case clerk and readied for trial (R. 233). The trial judge then sends to the jury assembly room for the "tin little box" and draws the names of 24 to 28 persons from it (R. 111-3). The partial

panel — persons whose names have been drawn — are then brought to the courtroom where the lawyers proceed to "strike" (R. 113).

Bessemer Division

The clerk sets the docket. Thirty days before trial time the jury box is removed from the safe in the clerk's office and taken to the courtroom. In the presence of the clerk the judge opens the box, shuffles the cards, pulls out a "handful" and counts out 20. Then he reshuffles the box. After selecting the names of 80 persons the venire is sent to the sheriff for service (R. 397-9).

When grand juries are to be selected the clerk carries the box to the courtroom the judge drawing 35 to 40 names from the box. The clerk then prepares an alphabetical list of the names drawn and delivers it to the sheriff for service. On the following Monday morning the prospective grand jurors arrive in court and 18 of them are selected for grand jury duty (R.R. 419-20).

The Results — Grand Juries

Birmingham Division. Since 1947 (R. 211) the largest number of Negroes to appear on a grand jury which consists of 18 persons is 3 (R. 214). On others 2 Negroes have appeared. Almost all grand juries include at least 1 Negro (R. 213-5). Four grand juries are empaneled in the Birmingham Division each year (R. 214, 216-7). The names of grand jurors are selected at random from the jury box (R. 215, 226).

Bessemer Division. On only one occasion (September 9, 1957, when Caliph Washington was indicted) in the last 20 years has a Negro sat on a grand jury (R. 70, 357, 392-3, 415-6). The names of grand jurors are drawn from the jury box at random (R. 418-22) at least 4 times a year (Title 30, Sec. 72, Code of Alabama, 1940 Recomp. 1958). "The strange absence of Negroes from grand jury service" is unexplained (R. 422).

The Results, Birmingham Division:

A. *Petit Jurors in the Jury Assembly Room.*

1. *The testimony of attorneys practicing in Birmingham.*

Roscoe B. Hogan, 12 years practice — 8 to 12 of the 90 to 105 persons in the jury assembly room are Negroes (R. 167-8). *Arthur D. Shores,* 25 years practice — 7 of the 65 to 70 persons in the jury assembly room was the highest number he had ever seen (R. 128-9). *David H. Hood,* 14 years practice — often no Negroes in the jury assembly room (R. 100-1) sometimes 1 or 2 (R. 100).

2. *The testimony of officials.*

J. Edgar Bowron, presiding judge and a Circuit Judge for 27 years — the number of Negroes varies but there were 8 one week 2 or 3 another (R. 240). Of 240 persons called for jury duty 8 or 10 may be Negroes (R. 242-3). *Julian Swift,* Circuit Clerk, 14 years — "imagines" 10% or 12% of persons in the jury assembly room are Negroes (R. 210). Nine of 112 or 105 (R. 206) who appeared during the week he testified were

Negroes (R. 205). He recalls as many as 18 to 20 Negroes reported for jury duty once but never as many as 30% (R. 209) and on further examination fixed 10 to 12% as the percentage of Negroes in the room (R. 210).

3. *The testimony of Negroes called for jury duty.*

Frederick L. Ellis — 10 Negroes in room with him. There were 35 or 40 there he "imagined." The room was full (R. 246). *Hugh L. Lemon* — 3 of 100 were Negroes (R. 122). *Louis J. Willie* — 10 of more than 100 were Negroes (R. 139).

B. *Partial panels called from the jury assembly room.*

1. *The testimony of attorneys practicing in Birmingham.*

Jerry O. Lorant, 12 years practice — no judgment of largest number of Negroes seen on a partial panel (R. 76). Negroes had served on juries in cases he'd tried (R. 77), but he couldn't remember how often or the name of a case (a criminal case) or the judge before whom it was tried (R. 78-80). *David H. Hood* — 14 years practice — no Negroes on panels prior to 1961 but he has seen 1 or 2 since then (R. 102-3). *James G. Adams,* 41 years practice — "occasionally, not often, but occasionally" he has seen Negroes on a partial panel apparently in the criminal courts (R. 115). He has seen 3 Negroes on a partial panel of 27 to 28 men but in the preceding year he saw no more than 1 or 2 Negroes (R. 117-9). *Arthur D. Shores,* 25 years practice — on 1 or 2 occasions he observed 1 or 2 Negroes on partial

panels (R. 129). *Matt Murphy,* 15 years practice — once saw 6 to 8 Negroes on a partial panel (R. 144-5) but since 1960 he has seen no more than 3 or 4 on a panel of 40 and this in a criminal case (R. 145-7). *John H. Lair,* 10 years practice — once saw 7 Negroes on a panel but doesn't remember the case and may have been in error (R. 220).

2. *The testimony of officials.*

Emmett Perry, Circuit Solicitor since 1947 — he had seen Negroes on partial panels but never counted the number of them (R. 212-3). *Wallace Gibson,* Circuit Judge criminal courts since 1957 — once saw a partial panel of 24 jurors with 6 Negroes none of whom actually served (R. 223). Prior to this one occasion the largest number of Negroes in a partial panel was 2 or 3 (R. 224-5). *J. Edgar Bowron,* presiding judge and a Circuit Judge for 27 years — Negroes are on partial panels fewer times than they are not (R. 239) and infrequently have served on juries in his court. No more than 1 Negro has served on a petit jury at one time (R. 238). He often handles excuses from jury duty but there is no evidence that a higher percentage of Negroes than whites sought excuses (R. 240-4).

Negroes who are called for jury service seldom leave the jury assembly room and when they do are almost aways struck and rarely serve (R. 125, 140, 174, 197, 228-9, 245, 247-54, 255-7). In the criminal courts agreements not to include Negroes on partial panels called from the jury room have been abolished (R. 225). But exclusionary agreements exist in the civil courts (R. 115, 169-70, 198-9, 234, 237) although this was disputed (R. 220-1).

The Results: Bessemer Division

A. *Petit Juries*

1. *The testimony of attorneys practicing in Bessemer.*

H. P. Lipscomb, Jr., more than 40 years practice — 3 Negroes out of "quite a number" of whites; 4 or 5 juries were empaneled for the Washington case in 1957. Prior to 1962 this was the only time any Negroes were empaneled (R. 69-70). During the succeeding 2 years he noted as many as 3 or 4 Negroes on the venire of 50 to 60 persons (R. 360-4). *David H. Hood*, 14 years practice — no observation of Negroes on the panel or venire (R. 97). *William C. Smithson*, 45 years practice — no Negroes seen on a jury panel (R. 109). *Hugh McEniry*, 52 years practice — last saw a Negro juror serve in the Caliph Washington case (R. 180-1). *Edward Saunders*, 32 years practice — no Negroes on a panel in 5 years (R. 183-5).

2. *The testimony of officials.*

Edward L. Ball, Jr., Circuit Judge and attorney for 23 years — cannot recall a civil or criminal case when Negroes actually served on a petit jury (R. 390-1). Since 1957, 4 Negroes usually appear on a venire of 37 to 38 people, one week it was 5 Negroes in a venire of 48, and once there were 7 or 8 Negroes on a venire of 42 (R. 391-2). There have never been as many Negroes as whites on a venire (R. 410). Although there are no racial markings on jury cards he knows by addresses which communities are predominantly or all white and which are Negro (R. 401-3). *Elmore Mc-*

Adory, Deputy Circuit Clerk and Registrar for 12 years — no Negroes have served on a petit jury in 20 years (R. 415). Negroes first began to appear on the venire in 1953 (R. 424). Although he once observed 9 Negroes on a venire and once 8 he could recall no details of this except it happened in 1964 (R. 430-1).

Several Negroes testified as to their own qualifications and the failure of the state to call them or their associates, neighbors, kinsmen and church members for jury service (R. 261-76). Indeed the clerk of the Jury Board had no opinion on whether "the incidence of qualification for conviction of crime was higher among white than colored, or colored than white" when the Court asked (R. 444). There was no testimony concerning Negro or white crime or illiteracy rates (R. 464). There is some vague testimony concerning more whites being qualified and more colored citizens asking to be excused or it "could be the sheriff didn't serve Negroes" (see generally R. 467-74). But the presiding judge of the Tenth Judicial Circuit (Birmingham Division) did not testify that he excused more or a higher percentage of Negroes than whites (R. 240-4). Nor did the Deputy Clerk (Bessemer Division) know about this (R. 422).

There was no testimony regarding the rates of literacy, householding, freeholding, honesty, intelligence, character, habitual drunkeness, disease or physical weakness of either Negroes or whites.

The population: Jefferson County as a whole.

There are 120,205 (70%) white and 51,961 (30%) non-white males over 21 years of age in Jefferson County (R. 301). Of these 13,796 white and 7,097 non-

white males are over 65 years of age and, consequently, ineligible for jury service (R. 302-3). Thus the total number of whites eligible for jury service in Jefferson County is 106,409 (70%). The total number of eligible non-whites, 44,864 (30%) (R. 302-3; see 1960 U.S. Census, Alabama p. 2-83).

The total number of names listed on jury rolls is approximately 52,000 (R. 284).

Bessemer Division. The Bessemer Division consists of Precincts 53, 33 and a small part of 9 (R. 364-5, 377-9). There are 33,989 males over 21 years of age. Of these 20,449 are white, 13,540 are non-white. Of the 29,900 males in the 21 to 65 age bracket 18,313 (61%) are white, 11,587 (39%) are non-white. (See Exhibit 1: also R. 376-9).

The total number of names listed on jury rolls in 1961-63 was 8,892 (R. 379).

Birmingham Division. There are 121,373 males eligible for jury service in the Birmingham Division. Of these 88,096 (73%) are white, 33,277 (27%) are non-white.

The total number (approximate) of names listed on jury rolls is 43,108.

REASONS FOR GRANTING THE WRIT

This is the first civil action brought by Negroes against state court jury officials to reach this Court.[3]

[3]The Title 42, Section 1983, U.S.C. remedy was first suggested by Mr. Justice Jackson dissenting in *Cassell* v. *Texas*, U.S. 282, 303-304.

Grand juries in Jefferson County, Alabama are drawn at random from jury boxes which are separately maintained in the county's two divisions. Yet only 1 Negro has served on a grand jury in the Bessemer Division (one Negro in 68 grand juries, a ratio of 1223 white grand jurors to one Negro grand juror), and not more than three Negroes (sometimes one, sometimes 2, but at most a ratio of 1020 white grand jurors to 204 Negro grand jurors) have served on a grand jury in the Birmingham Division. This despite the fact that Negroes comprise 39% and 27% of the age group eligible for jury duty in the Bessemer and Birmingham Divisions respectively.

These facts are uncontroverted and remain unexplained by the defendant jury commissioners.

The decision of the District Court was affirmed by the United States Court of Appeals for the Fifth Circuit *en banc*, which relied upon *Swain* v. *Alabama*, 380 U.S. 202 (1965) contending that "the plaintiffs failed in their proof." (359 F. 2d 13, 22) The failure of proof apparently resulted from the failure of the plaintiffs to actually prove the racial identity of those persons whose names were on the jury rolls. The opinion in footnote 6 quotes from the brief of the United States, *amicus curiae*, as follows:

> "Although the Government in its brief as *amicus curiae* suggests that the case be remanded for further hearing, the brief forthrightly admits that there was an insufficiency of the evidence. We quote from the brief:

> "The difficult problem in this case is that a critical link in the evidence — the racial composition of the jury boxes — is missing. If for example the plaintiff could have proved that the jury boxes contain extremely low percentages of names of Negroes, or that some precincts heavily populated with Negroes are grossly underrepresented, these facts would cast considerable doubt upon the credibility of the testimony of members of the Jury Board explaining their system for selection. If on the other hand the proof showed that there was a substantial or reasonable proportion of names of Negroes in the jury boxes the plaintiff would lose his case as to these defendants.
>
> "As the record stands, this Court could conclude that the plaintiff had failed in his proof, since the racial composition of the jury boxes was not proved." (359 F. 2d 13, 22-23)

But it should be noted that Judge Gewin's opinion distorted the quotation by deletion of the following portion of the brief of the United States, *amicus curiae* which prior to the ultimate paragraph in the quoted portion, stated:

> "But there are two compelling reasons why we think that result would be inappropriate in this case. First, plaintiff has produced evidence of a substantial disparity between the number of Negroes in the population and the number of Negroes who have actually served on juries over a period of time. Second, it would be an

extremely difficult, if not possible, [sic] burden for the plaintiff to prove the racial composition of the jury boxes.

"Generally, evidence capable of showing the racial composition of a jury box will be in the peculiar control of those responsible for its makeup. In counties smaller than Jefferson, jury board members are likely to be capable of making a racial identification from their own personal knowledge. Compare *Davis* v. *Davis*, No. 21976. In larger counties, the task becomes more difficult for jury board members, but correspondingly far more arduous for private plaintiffs. Compare *LaBat* v. *Bennett*, No. 22218; see Wigmore, Evidence, §2486 (3rd ed. 1940). Jury board members who are sued in their official capacity as officers of the county and of the state would have ready access to sources which show race, be they records in the possession of other state officials or personal knowledge in the minds of those officials.[4] Furthermore it is clear that in the Jefferson County jury selection system and in any other like system, information could be kept by the jury board members which would permit a check to be made on the racial identification of the box without creating any significant dangers of discrimination at later stages of the system. Compare *Avery* v. *Georgia*, 345 U.S. 559. For example, the canvassers in Jefferson County could readily record race on their daily work

[4]See *Swain* v. *Alabama*, 380 U.S. 202, 240 (Goldberg J. dissenting).

sheets and preserve them rather than dispose of them, as is apparently the practice (84).

"The Government's experience in making racial identifications in numerous voter registration cases suggests that although a private plaintiff could make racial identifications, the burden of doing so in terms of money and man-hours would be extremely onerous, and could be made almost impossible if cooperation by state officials could not be obtained. To place this burden upon private plaintiffs who do not have the investigative and financial resources available to the federal government and who may not obtain the cooperation of state officials could substantially limit the potential effectiveness of civil litigation as a means of correcting the problems of jury exclusion.

"We believe that in such circumstances the defendants should be required to come forward with the information necessary to a determination of the racial composition of the jury box, and that based on that information the plaintiff should have an opportunity to make further proof going to discrimination in the selection system or in its administration. We therefore urge that the case be remanded for further hearing."

Indeed, the "failure of proof" relied upon by the Court of Appeals seems inconsistent with the following in the same opinion:

> "Testimony indicated that one Negro sat on a Bessemer grand jury in 1957, but that none has served since that date" (359 F. 2d 13, 22).
>
> * * * *
>
> "The record does disclose that Negroes seldom sit on petit or grand juries in the Bessemer Division. We do not approve the situation which the record shows to exist in the Bessemer Division. However the record fails to show any connection whatever between this fact and the performance of their duties by the members of the Jury Board and its Clerk." (359 F. 2d 13, 23).

The Court relied upon the "good faith" of the Jury Board. It noted:

> "[T]he record fails to show a lack of good faith on the part of jury officials to obtain qualified Negroes for jury service." (359 F. 2d 13, 23).

Despite the disparity between eligible Negro population and those actually called for jury service (grand or petit, before exercise of challenges for cause, peremptory challenges or strikes) in the Bessemer Division and, for that matter, the Birmingham Division, the state offered no evidence that the disparity was caused by non-defendants. Evidence of jury exclusion by state officials would, of course, prove the commission of a crime under Title 18, Section 243, United States Code.

The *Billingsley* opinion interprets *Swain* as requiring that private litigants present proof of bad faith even where oral testimony is sufficient to make out a pre-*Swain prima facie* case. Here the District Court relied on the "good faith" of the Jury Board. But by clothing the Jury Board in good faith it imputed bad faith to other state court officials — judges, sheriffs or others. By assuming that the jury board acted in good faith and implicitly recognizing the exclusion of Negroes from jury service, the District Court assumed, without proof, that state officials other than the defendants did the excluding.

Clarence C. Walker Civic League v. *Board of Public Instruction* 154 F. 2d 726 (5th Cir. 1946) provided this theory that public officials — the Jury Board members — were entitled to a presumption of good faith. Of course, by the same reasoning both the District Court and the Court of Appeals presumed that public officials not parties to the case and without proof, were excluding Negroes and acting in bad faith.

An additional reason for granting the petition for writ of certiorari in this case is the present state of the law relating to jury exclusion in the Fifth Circuit.

Since the *en banc* hearings December 16-17, 1965 the Court of Appeals has decided cases in a manner which places principles if not decisions in conflict.

In *Davis* the jury commissioners' subjective intent and their general assertions of non-participation in a system or plan to exclude Negroes from juries were not considered relevant since they did not fulfill the duty of familiarizing themselves with the qualifications

of Negroes for jury duty. (slip opinion pp. 7-8) In *Rabinowitz* it was conceded that no "affirmative evil intent of the jury commissioners was involved." (slip opinion p. 3) In *Scott* the Court of Appeals noted: "The state's efforts consisted almost solely in obtaining the conclusionary response to the question whether the commissioners participated in any plan or scheme to exclude Negroes on account of race. These answers could honestly be given by persons who had, nevertheless, by their conduct produced the result, even through [sic] no illegal or evil motive or absence of good faith that the Constitution outlaws." (358 F. 2d 561, 573)

But in *Billingsley* the failure of plaintiffs "to show a lack of good faith" on the part of the Jury Board was considered a part of the failure of proof. (359 F. 2d 13, 23)

Davis arose in Acadia Parish, Louisiana, where the total population was 49,931. The list from which percentages of racial participation on petit juries were gleaned consisted of eleven lists of thirty persons each (330) and a supplemental list which contained 502 names. Grand jury percentages came from four lists of twenty persons each. The jury commissioners were requested to identify Negroes on these lists. In *Rabinowitz* the percentages were drawn from racially designated jury records maintained by Federal officials and by post-trial admissions regarding the racial identity of jurors. *Scott* arose in Livingston Parish, Louisiana where the total population was 26,974. There a list of 300 names was involved and the testimony of jury commissioners was held to be conclusive evidence of the percentage of Negroes on the rolls. The source of juror

names was voter rolls which in *Scott* carried racial identification. Thus jury commissioners had access to the racially designated records from which racial identity could be garnered.

Billingsley arose in Jefferson County, Alabama where the total population was 642,000. There were no racial designations on the source lists. Indeed, lists were not even used. Here the sources were a house-to-house canvass by the white employees of the Jury Board. Records and all work sheets had been destroyed. All that existed was a list of unidentified names, 43,108 in the Birmingham Division, 8,892 in the Bessemer Division.

Counsel for plaintiffs attempted to examine the Clerk of Court of the Bessemer Division regarding the racial breakdown of the list of jurors but, due to the size of the list, the request was denied. (R. 427-8).

Thus the Court of Appeals opinion seems in conflict with pre-*Swain* requirements regarding the standards and techniques of proof of the systematic exclusion of Negroes from juries. The use of oral testimony was held conclusive in *Scott* and *Davis*. It was unnecessary in *Rabinowitz*, since racially designated records were available. But in *Billingsley* oral testimony was not given sufficient weight to make out a *prima facie* case.

Since *Scott*, *Davis* and *Rabinowitz* each demonstrate the systematic exclusion of Negroes on the jury rolls, the question of exclusion by officials other than the commissioners does not arise. But, in *Billingsley* — due to the number of names on the list — the technique of

proof was necessarily the race of those whose names were drawn from the box and appeared on grand juries and petit jury panels prior to challenges for cause, peremptory challenges or strikes. Thus the drawing by judicial officials at random by law, service by the sheriff and excuses by the judge (said not to be disproportionate racially R. 240-4), entered at an intervening time between the selection of jurors' names and the proof of the racial makeup of jury panels. Oral testimony clearly shows a racial disparity sufficient to make a *prima facie* case of exclusion in both Bessemer and Birmingham. But the plaintiffs did not negate the possibility of corrupt state court judges or sheriffs. The opinion of the court presumes this corruption. Must the plaintiffs prove its non-existence or must the defendants — public officials — prove the racial makeup of the lists or perhaps the miscreance of their fellow public officials?

Questions relating to the use of racially designated tax digests in the selection of the names of grand and petit jurors are presently before this Court. (See *Whitus* and *Davis* v. *Georgia*, Misc. No. 1270 and *Sims* v. *Georgia*, Misc. No. 918. The disadvantages to Negroes of racially segregated tax digests is apparent (cf. *Avery* v. *State*, 345 U.S. 559 (1953)). They allow the jury commissioners racial knowledge prior to the application of subjective standards of juror qualifications in the name selection process. Here the house-to-house canvass system allows a similar foreknowledge and a similar opportunity for discrimination. But the use of racially designated records, if selections are made at random or a canvass system, if scientifically carried out at random, will not result in prejudice.

In both *Whitus* and *Davis* and in *Sims* and in *Scott* there are, at least, lists from which the racial identity of jurors could be obtained with the cooperation of state officials. Here the state should have been required to supply the racial identity of those on jury rolls. Cf. *Rabinowitz,* where the juror records were themselves utilized and the data was provided by the United States.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Orzell Billingsley, Sr., C. Herbert Oliver, J. S. Phifer, Abraham Woods, Jr., for themselves, jointly and severally, and for all others similarly situated,

Plaintiffs,

vs.

CIVIL ACTION
NO. 10136

George W. Clayton, as President of the Jury Board of Jefferson County, Alabama; Mrs. Fred Bátson, as Vice President of the Jury Board of Jefferson County, Alabama; Walter E. Palmer, as Associate Member of the Jury Board of Jefferson County, Alabama; James F. Cheatwood, as Clerk of the Jury Board of Jefferson County, Alabama; and each of their successors in office.

Defendants.

OPINION AND ORDER

(Filed June 7, 1962)

This matter is before the Court on application for preliminary injunction, following a hearing during which extensive testimony was taken.

The jurisdiction of the Court is invoked under Title 28, U.S.C.A., § 1343(3). The suit is alleged to be authorized under Title 42, U.S.C.A. § § 1981 and 1983, and

the Fifth and Fourteenth Amendments to the Constitution of the United States. Declaratory relief is sought under Title 28, U.S.C.A. § 2201,

Plaintiffs are Negro citizens of Jefferson County, Alabama. Plaintiff, C. Herbert Oliver, is a resident of that part of the county known as the "Bessemer Cut-Off." The other plaintiffs reside in the Birmingham division of the county. Defendants Clayton, Batson and Palmer are members of the Jury Board and defendant Cheatwood is Clerk of the Jury Board of Jefferson County.

The action is filed on behalf of plaintiffs, as well as on behalf of all others similarly situated, pursuant to Rule 23(a)(3) of the Federal Rules of Civil Procedure.

Plaintiff Billingsley now has a civil action pending in the Circuit Court of Jefferson County which is to be tried when reached in proper order.

The plaintiffs charge that Negro citizens possessing all of the qualifications of jurors and none of the disqualifications have been and are arbitrarily, intentionally, and systematically excluded from jury service in Jefferson County, Alabama, and discriminated against in the organization of juries in said county solely on account of their race or color; that since Reconstruction days and at the present time the jury rolls of said county contain less than five per cent of the names of the total number of Negro males eligible for jury duty, and that the method of the selection of names of Negroes to be placed on the jury rolls and in the jury boxes of said county by the defendant Board members is highly irregular, arbitrary and contrary to the method pre-

scribed by the Constitution and the laws of the State of Alabama and of the United States of America.

Plaintiffs pray that defendants be enjoined from failing or refusing to place the names of all qualified persons on the jury rolls and in the jury boxes in said county solely on account of their race or color, and from utilizing any names presently contained in the jury boxes or on the jury rolls for jury duty until such times as the names of all Negroes qualified for jury duty shall have been placed in the boxes and on the rolls.

The evidence in this case reveals that in making up the jury rolls the Clerk of the Jury Board and his assistants go through the telephone directories and tax records and make a personal survey of each precinct in the county at least once a year. In addition to the personal survey, the Clerk has yearly for many years mailed letters to some 80 to 100 or more prominent Negro citizens, including ministers, requesting that they submit the names of individuals qualified for jury service. Replies have been received from only about one out of nine or ten such requests for information. A check is made of the name submitted and those qualified are placed on the jury rolls and ultimately in the jury box. It appears that these letter requests are made because of the difficulty in obtaining information from prospective Negro jurors. The evidence reveals that the Clerk and his assistants have had difficulty in obtaining information from Negroes of the lower economic level and, as above indicated, prominent Negro citizens have been indifferent in respect to furnishing names of prospective jurors.

In making the survey not every house is visited but if the occupant is not at home where a visit is made a card is left by which the occupant may furnish information as to his availability for jury service. Only five per cent of such cards have been returned from the area occupied by Negroes of the lower economic level, as contrasted to fifty per cent from whites and Negroes of the higher economic level. In short, the evidence reveals that the Board has made extra efforts to procure information with respect to prospective Negro jurors over and above that exerted to procure like information from prospective white jurors. The Board has not received the same cooperation from colored citizens as it has from white citizens, and the rank and file of the colored citizens do not appear to be as interested in jury service as is the case with white citizens. The evidence reveals that in the course of the years the Clerk has been connected with the Board thousands of white persons have called or come into the office to find out why they had not been called for jury duty. During the same period, very few Negroes had called, and only two came by the office for like purpose.

The records of the Jury Board do not reveal the racial identity of a juror. Plaintiffs contend that there should be no such identification. The evidence wholly fails to reveal the percentage of Negro voters on the roll, but, judging from the number called for service, the number is substantial.

The Circuit Court in the Birmingham division is in continuous session for the trial of jury cases, except during the summer vacation and during brief periods of time in the spring and fall for the trial of nonjury

cases. The evidence reveals that, with rare exceptions, Negro jurors appear for duty on every panel, the number ranging from three or four to as many as twenty. A number of Negro witnesses who testified stated they had been called on one or more occasions for jury duty. Others testified they had not been called, but, as above indicated, many whites were not called. Some of those who are called for jury duty are used in the trial of cases.

The evidence discloses that at times lawyers in civil actions, upon ascertaining that certain Negroes were on the panel, would agree, that as respects to the particular case up for trial, to avoid having to strike him, if a Negro juror's name was drawn, he would not be brought from the jury assembly room. One of the Circuit Judges testified that this practice had been abandoned several years ago in his division of the court. The evidence does not indicate that the practice has been indulged in where there was a Negro lawyer or Negro party involved. The Court does not commend this practice, if presently indulged in; nevertheless, these defendants are not to be condemned for something for which they are not responsible. Such matters should be addressed to the Court.

Few Negroes appear to have been called for jury duty in the Bessemer Cut-Off. The evidence reveals that exactly the same standards were applied by the Jury Board in the selection of prospective jurors in the Bessemer Cut-Off as were applied in the Birmingham division. Taking such evidence at face value, the real cause of complaint would appear to lie with others than the Board. There was a dearth of evidence with respect to the matter in the Bessemer Cut-Off as compared to

that respecting the Birmingham division. Perhaps the matter will be clarified upon the final hearing of this case.

The general provisions with respect to juries and the jury commissions of the several counties of the State are found in Title 30, § § 1 to 100, of the Code of Alabama, 1940. Except for certain general provisions, the matter is largely regulated in Jefferson County by Sections 196 to 228 of Title 62, Code of Alabama, 1940. In Jefferson County the body charged with the selection of jurors is called a "Jury Board" whereas, in other counties it is called a "Jury Commission." In Jefferson County, the law requires (§ 199) the Board to obtain the names of male citizens between the ages of 21 and 65. In other areas of the State a person over 65 is not required to serve on a jury (§ 21, Title 30), but is not mandatorily excluded. By virtue of Section 200 of Title 62, the Jury Board has "performed the duties required of it by law when they shall have prepared a jury roll . . . in compliance with the law consisting of the names of qualified jurors in number equal to at least 6 per cent of the population of the county in accordance with the last Federal census. . . ." When the roll is made up and the box is filled, the box is then delivered into the custody of the presiding judge of the Circuit Court. Under the general provisions of the law, the box is kept in the office of the Probate Judge and the president of the Jury Commission keeps one of the keys to the same (§ 20, Title 30). In Jefferson County, the jury box is refilled every two years, and the obtaining of information and the selection of jurors for the rolls is a continuous process, with a continuous purging of the same. More than 20 categories of individuals are exempt from jury duty, based upon the nature of the employment of the

individuals involved (§ 3, Title 30). The qualifications of jurors are prescribed by Section 21 of Title 30.

By virtue of Section 201 of Title 62, the Jury Board is charged with requiring the Clerk of the Board "to scan the registration lists, the lists returned to the Tax Assessor, any city directory, telephone directory, and any and every other source of information from which he may obtain information, and to visit every precinct at least once a year. . . ." The Clerk stated that he did not regularly use the registration list, since a person could be a qualified juror without being a qualified voter, and could be a qualified voter and not a qualified juror; that the registration list contained many individuals over 65 years of age and individuals incapacitated for jury service. The voting list indicates those who are colored, but do not give addresses, but only the precinct and the address of the box where the party is to vote.

The 1960 Census reveals that there are 120,205 white males over 21 years of age and 51,961 nonwhite males residing in Jefferson County; that between the ages of 21 and 65 there are 106,409 white males and 44,864 nonwhite males. Roughly, the percentage is 71 white and 29 nonwhite. The jury rolls consist of 8,892 names in the Bessemer Cut-Off, 43,837 names in the Birmingham division.

The Supreme Court, in *Akins v. Texas*, 325 U.S. 398, 403-4 (1945), has stated that "fairness in selection has never been held to require proportional representation of races upon a jury." In that case it was further stated that "the mere fact of inequality in the number (of a

racial group) selected does not in itself show discrimination. A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination."

The law does not require that racial groups be recognized in the composition of juries; however, their continual exclusion or mere symbolic representation will constitute discrimination.

In *Cassell v. Texas*, 339 U.S. 282 (286-287), the Court stated:

"Jurymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race.

"We have recently written why proportional representation of races on a jury is not a constitutional requisite.[1] Succinctly stated, our reason was that the Constitution requires only a fair jury selected without regard to race. Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation. Similarly, since there can be no exclusion of Negroes as a race and no discrimination because of color,[2] proportional limitation is not permissible. That conclusion is compelled by the United States Code.

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[1] *Akins v. Texas*, Supra (325 U.S. 398).
[2] *Neal v. Delaware*, 103 U.S. 370; *Akins v. Texas*, supra, 404.

Title 18, §243,[3] based on §4 of the Civil Rights Act of 1875. While the language of the section directs attention to the right to serve as a juror, its command has long been recognized also to assure rights to an accused. Prohibiting racial disqualification of Negroes for jury service, this congressional enactment under the Fourteenth Amendment, § 5,[4] has been consistently sustained and its violation held to deny a proper trial to a Negro accused.[5] Proportional racial limitation is therefore forbidden. An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race."

As observed, the Jury Board does not have possession of the jury box. The possession of the box is with the presiding judge of the Cut-Off and the presiding judge of the Birmingham division, and as further noted, the evidence reveals that the Cut-Off jury rolls are made up in the same manner as the rolls in Birmingham. Officers are presumed to act in good faith in discharging their duties. Bad faith is not to be imputed. *Clarence C. Walker Civic League et al v. Board of Public Instruction*, 5 Cir., 154 F. 2d 726.

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[3]"No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000."

[4]"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[5]See *Neal v. Delaware*, supra, 385, 386; *Hill v. Texas*, supra, 404 (316 U.S. 400); *Fay v. New York* supra, 284 (332 U.S. 261).

From the evidence in this case, no reasonably exact comparison can be made between the white and Negro citizens as to the percentage of each race which is eligible for jury service which might tend to indicate discrimination against eligible Negroes.

On the evidence and in the light of the authorities referred to, the Court is of the opinion, acting in pursuance of a sound discretion, that this is not a case for the granting of a temporary injunction.

It is, therefore, ORDERED, ADJUDGED and DECREED by the Court, without prejudice to any final decree to be entered herein, that the petition for temporary injunction be and the same is hereby denied, and that the motion to dismiss be and the same is hereby continued pending a further hearing of this action on the merits.

Done and Ordered, this the 6 day of June, 1962.

H. H. GROOMS
DISTRICT JUDGE

ORDER ON PRE-TRIAL HEARING

(Number and Title Omitted) (Filed July 20, 1964)

This cause coming on to be heard on a regular pretrial hearing, and all parties being present in person or by counsel, the following action was thereupon taken:

1. The following pleadings and amendments were allowed: Complaint and answer to be filed.

2. It was agreed by all of the parties that the following are all of the issues in controversy in this cause:

This is an action by the plaintiffs and those similarly situated charging discrimination in the filling of the jury box and in the making up of the jury roll in Jefferson County, Alabama, both in Birmingham and in the Bessemer Cut-Off, all as more fully appears in the complaint filed herein.

The defendants' answer will be a general denial except as otherwise admitted pursuant to Rule 8(b).

The testimony which was taken on the hearing for a temporary injunction will be used in lieu of the retaking of evidence contained in said transcript, and the Court will hear only additional testimony not covered by the transcript.

It is therefore ORDERED by the Court that all of the above-named allowances and agreements be and the same are hereby binding upon all parties in the above-styled cause, unless this order be hereafter modified by order of the Court.

Done this 20th day of July 1964.

H. H. GROOMS
UNITED STATES DISTRICT JUDGE

ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Number and Title Omitted) (Filed December 2, 1964)

On November 2, 1964, the above styled action came on for final hearing. It was stipulated that the evidence taken on the hearing for a temporary injunction be considered by the Court on this final hearing without any retaking of the same. Additional evidence was heard.

The Court finds from the evidence:

(1) That five persons are engaged in making surveys of white communities and two in Negro communities in Jefferson County. The Clerk of the Jury Commission and his assistant make the surveys in the Negro communities.

(2) That there are in the Bessemer Cut-Off, about which the chief complaint is here made, 29,900 males over twenty-one and under sixty-five years of age and that of this number 18,313, or approximately 62 per cent, are white and 11,587, or approximately 38 per cent, are non-white. The breakdown between Negroes and other non-whites is not disclosed by the evidence.

(3) The percentage of non-whites eligible in relation to the whites eligible under Title 30, Section 21, of the Alabama Code is not disclosed, nor is the percentage of the non-whites claiming exemptions under Title 30, Section 3, in relation to whites claiming exemptions shown. The number of non-whites actually "served"

with summonses for jury duty in relation to whites "served" is likewise not shown by the evidence.

(4) Negroes appear regularly for jury service and the number is never less than four. There were five on the venire during the week of this hearing, and there have been occasions when there were eight or nine on the venire, which averages about forty-eight men.

(5) Negroes seldom sit on the trial of cases or serve on grand juries in the Bessemer Cut-Off.

(6) In the organization of the jury week-by-week Negro jurors are assigned to jury 4.

Once the jury box has been filled possession is surrendered to the presiding judge of the court. These defendants have nothing whatever to do with the summoning of jurors for duty, drawing their names from the box, excusing them from service after they have been summoned, assigning them to numbered juries, or selecting those who shall serve on the grand jury or on the trial juries. The number of peremptory challenges in both civil and criminal cases is fixed by statute. The exercise of such peremptory challenges rests exclusively with the parties.

Any disparity between Negro and white jurors resulting from the summoning, drawing, excusing, assigning or selecting of jurors cannot be attributed to these defendants.

The court does not find evidence even in the presence of some disparity in numbers of those actually serving which is sufficient to establish discrimination

against eligible Negroes in the formulation of the jury roll and in the filling of the jury box.

It hardly need be said that the Court cannot grant relief against parties not before it or grant relief in areas over which these defendants have no jurisdiction or right to intervene, and their actions should not be controlled by injunction when the right to redress appears to lie elsewhere.

For its further Findings of Fact and Conclusions of Law the Court here adopts the opinion filed in this cause on June 7, 1962, and the findings of fact and conclusions of law stated therein.

Judgment will be entered in accordance with the foregoing.

Done and Ordered, this the 2nd day of December, 1964.

H. H. Grooms
United States District Judge

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(Number and Title Omitted) (April 5, 1966)

Before TUTTLE, Chief Judge, BROWN, WISDOM, GEWIN, BELL, THORNBERRY and COLEMAN, Circuit Judges.

GEWIN, Circuit Judge: This is a jury exclusion

case, but not one of the usual type. Most of the cases dealing with the subject arise from a conviction in a serious criminal case in which it is claimed that the constitutional rights of a Negro defendant have been infringed because Negroes were systematically excluded from jury service. This is a civil proceeding.

The Negro plaintiffs (appellants) brought this class action against the three members and the clerk of the Jefferson County, Alabama Jury Board (appellees), claiming systematic exclusion of qualified Negroes from the jury rolls of Jefferson County.[1] A preliminary injunction was sought but was denied after a hearing in the United States District Court for the Northern District of Alabama, such denial being without prejudice to the right to relief on final hearing. A further hearing was held, additional findings of fact and conclusions of law were entered, and relief was denied. The trial court found the existence of a disparity between the proportion of Negroes actually serving as jurors and the proportion of Negro Residents in the County, but concluded there was insufficient evidence to support a finding of improper conduct or constitutional wrongdoing on the part of appellees.

This is one of several cases relating to the problem of discriminatory exclusion from juries recently heard by this Court en banc. Various fact situations were

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[1] In Cassell v. Texas, 339 U.S. 282, 303-304, Mr. Justice Jackson made the following suggestion:

> "Qualified Negroes excluded by discrimination have available . . . remedies in a court of equity. I suppose there is no doubt, and if there is this Court can dispel it, that a citizen or a class of citizens unlawfully excluded from jury service could maintain in a federal court an individual or a class action for an injunction or mandamus against the state officers responsible."

presented, and both *State* and *Federal* cases were involved. This case deals with a state jury selection system. Several Attorneys General of the interested states filed briefs, and the United States filed briefs in each case as amicus curiae by invitation of the Court.[2]

Before outlining the facts which were presented at the trial, it is appropriate to discuss some of the legal principles and guidelines which have been developed by the numerous cases dealing with the subject, insofar as the same relate to the issues presented by this appeal.

A just and fair trial by an unbiased, unprejudiced and impartial tribunal is one of the great American constitutional principles. There can be no "due process" or "equal protection" unless that principle remains inviolate. *Brown v. New Jersey,* 175 U.S. 172, 175; *Hayes v. Missouri,* 120 U.S. 68, 71; *Northern Pacific R.R. Co. v. Herbert,* 116 U.S. 642,646. There is no expressed constitutional provision as to the classes of persons entitled to render jury service, but the law does require that qualified persons not be excluded from jury service on a class basis. Systematic and purposeful exclusion of qualified persons cannot be reconciled with the American concept of an impartial trial. Prejudices against certain classes tend to affect the judgment of jurors and result in a denial to members of such classes the full and complete enjoyment of constitutional guarantees. *Strauder v. West Virginia,* 100 U.S. 303; *Ex parte Virginia,* 100 U.S. 339,345;

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[2]In the selection of state juries, compliance with both the due process and equal protection of the law provisions of the Fourteenth Amendment is required. See Fay v. New York, 332 U.S. 261, 284 N. 27. These two constitutional protections are substantially co-extensive as applied to juries.

Fay v. New York, supra. It makes no difference whether the exclusion is the result of administrative action or legislative enactments. Both administrative and legislative exclusion are condemned. *Neal v. Delaware,* 103 U.S. 370. The applicable rules are aimed at eradicating bias, prejudice, unfairness and partiality.

The attack of the appellants in this case must be grounded upon proof that they and the class they represent have been the victims of improper discrimination and exclusion from jury service in the jury selection procedure. *Fay v. New York, supra; Rawlins v. Georgia,* 201 U.S. 638. If their proof establishes the existence of a purposeful and substantially effective effort on the part of the appellees to deprive the appellants and members of their class of a realistic opportunity to render jury service, they are entitled to relief.[2A] *Brownfield v. South Carolina,* 189 U.S. 426; *Tarrance v. Florida,* 188 U.S. 519; *Bush v. Kentucky,* 107 U.S. 110; *Martin v. Texas,* 200 U.S. 316; *Thomas v.*

[2A] In Patton v. Mississippi, 332 U.S. 463 (1947) the proof was held to be sufficient:

> "We hold that the State wholly failed to meet the very strong evidence of purposeful racial discrimination made out by the petitioner upon the uncontradicted showing that for thirty years or more no Negro had served as a juror in the criminal courts of Lauderdale County. When a jury selection plan, whatever it is, operates in such way as always to result in the complete and long-continued exclusion of any representative at all from a large group of Negroes, or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand."

In Swain v. Alabama, 380 U.S. 202 (1965), the proof was deemed insufficient:

> "But an imperfect system is not equivalent to purposeful discrimination based on race. We do not think that the burden of proof was carried by petitioner in this case."

Texas, 212 U.S. 278; *Akins v. Texas*, 325 U.S. 358; *Patton v. Mississippi*, 332 U.S. 463; *Brown v. Allen*, 344 U.S. 443; *Swain v. Alabama*, 380 U.S. 202.

Bias and prejudice are not easily inferred and tend to be expelled by proof of fair representation of members of the complaining class or group on the juries involved. For example, see *Swain v. Alabama, supra; Akins v. Texas, supra; Thomas v. Texas, supra.* Minimal representation of the group claimed to have been excluded from a particular jury roll in comparison with their proportion of the population is a proper element of proof, but such proof standing alone does not constitute sufficient evidence of constitutional violation if it is adequately explained and is not long continued. In the instant case the appellants allege an intention to exclude, and the burden is upon them to prove such intent; if proved, they would be entitled to relief on that ground. *Brown v. Allen, supra; Smith v. Mississippi*, 162 U.S. 592; *Tarrance v. Florida, supra; Fay v. New York, supra.*

Notwithstanding the foregoing rules, the burden of proof is not insurmountable, though sometimes difficult. The difficulty arises out of the effort to prove sufficient facts to entitle the complaining parties to relief.[2B] For this reason, litigants are permitted to es-

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[2B]The rule as to the burden of proof is set out in Swain v. Alabama, 380 U.S. 202 (1965); and Fay v. New York, 332 U.S. 261 (1947) in the following language:

> "Further, '[j]urymen should be selected as individuals on the basis of individual qualifications, and not as members of a race,' Cassell v. Texas, 339 US 282,286, 94 L. ed 839, 847, 70 S Ct 629 (opinion of Mr. Justice Reed, announcing judgment). Nor is the constitutional command forbidding intentional exclusion limited to Negroes. It applies to any identifiable group in the community which may be the

tablish a prima facie case by proof of the objective results of the jury selection procedure. *Norris v. Alabama*, 294 U.S. 587; *Pierre v. Louisiana*, 306 U.S. 354; *Smith v. Texas, supra; Patton v. Mississippi, supra; Hernandez v. Texas*, 347 U.S. 475; *Reese v. Georgia*, 350 U.S. 85; *Arnold v. North Carolina*, 376 U.S. 773. As aptly stated by the Supreme Court in *Akins v. Texas, supra*, 325 U.S. at 403:

> "[o]ur directions that indictments be quashed when Negroes, although numerous in

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subject of prejudice. Hernandez v. Texas, 347 U.S. 475, 98 L ed 866, 74 S Ct 667. "But purposeful discrimination may not be assumed or merely asserted. Brownfield. v. South Carolina, 189 US 426, 47 L ed 882, 23 S Ct 510; Tarrance v. Florida, 188 US 519, 47 L ed 572, 23 S Ct 402; Smith v. Mississippi 162 US 592, 40 L ed 1082, 16 S Ct 900; Bush v. Kentucky, 107 US 110, 27 L ed 354, 1 S Ct 625. It must be proven, Tarrance v. Florida, supra; Martin v. Texas, 200 US 316; 50 L ed 497, 26 S Ct 338, the quantum of proof necessary being a matter of federal law." (Swain at p. 204-205)

* * * *

"It is fundamental in questioning the composition of a jury that a mere showing that a class was not represented in a particular jury is not enough; there must be a clear showing that its absence was caused by discrimination, and in nearly all cases it has been shown to have persisted over many years. Virginia v. Rives, 100 US 313,322,323, 25 L ed 667, 671; Martin v. Texas, 200 US 316, 320, 321, 50 L ed 497, 498, 499, 26 S Ct 338; Thomas v. Texas, 212 US 278, 282, 53 L ed 512, 513, 29 S Ct 393; Smith v. Texas, 311 US 128, 85 L ed 84, 61 S Ct 164; Hill v. Texas, 316 US 400, 86 L ed 1559, 62 S Ct 1159; Akins v. Texas, 325 US 398, 89 L ed 1692, 65 S Ct 1276, supra. Also, when discrimination of an unconstitutional kind is alleged, the burden of proving it purposeful and intentional is on the defendant. Tarrance v. Florida, 188 US 519, 47 L ed 572, 23 S Ct 402; Martin v. Texas, 200 US 316, 50 L ed 497, 26 S Ct 338; Norris v. Alabama, 294 US 587, 79 L ed 1074, 55 S Ct 479; Snowden v. Hughes, 321 US 1, 8, 9, 88 L ed 497, 502, 503, 64 S Ct 397; Akins v. Texas, 325 US 398, 400, 89 L ed 1692, 1694, 65 S Ct 1276." (Fay at p. 284-285)

> the community, were excluded from grand jury lists have been based on the theory that their continual exclusion indicated discrimination and not on the theory that racial groups must be recognized."

Token systematic inclusion of Negroes is only a facet of the overall problem of systematic exclusion; both are condemned by Federal and State cases.[3] As stated in *Brown v. Allen*, 344 U.S. 443: "Of course, token summoning of Negroes for jury service does not comply with equal protection. *Smith v. Texas*, 311 U.S. 128." See also *Scott v. Walker* (5 Cir. 1966) . . . F.2d. . . ; *Whitus v. Balkcom*, 333 F.2d 496, cert. den. 379 U.S. 931 (1964); *Allen v. State*, 110 Ga. App. 56, 137 S.E.2d 711

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[3]We quote from the appellants brief a collection of citations dealing with total exclusion and token inclusion of Negroes on juries:

> "See *Strauder v. West Virginia*, 100 U.S. 303 (1880) (Negroes prohibited by statute); *Neal v. Delaware*, 103 U.S. 370 (1881) (No Negroes for jury service); *Bush v. Kentucky*, 107 U.S. 110 (1883) (Negroes prohibited by statute); *Norris v. Alabama*, 294 U.S. 587 (1935) (No Negroes called within memory); *Hollins v. Oklahoma*, 295 U.S. 394 (1935) (No Negroes called for jury service; *Hale v. Kentucky*, 303 U.S. 613 (1938) (No Negroes called for 30 years); *Pierre v. Louisiana*, 306 U.S. 354 (1939) (One Negro called within memory); *Smith v. Texas*, 311 U.S. 128 (1940) (Eighteen Negroes called in 7 years); *Hill v. Texas*, 316 U.S. 400 (1942) (No Negroes called for 16 years); *Patton v. Mississippi*, 332 U.S. 463 (1947) (Three Negroes called in 30 years); *Cassell v. Texas*, 339 U.S. 282 (1950) (Twenty-one Negroes served in 6 years); *Hernandez v. Texas*, 347 U.S. 475 (1954) (No Mexicans served for 25 years); *Reece v. Georgia*, 350 U.S. 85 (1955) (Six Negroes called in 18 years); *Eubanks v. Louisiana*, 356 U.S. 584 (1958) (One Negro served in 18 years); *Arnold v. North Carolina*, 376 U.S. 773 (1964) (One Negro served in 24 years)."

(1964); *Harper v. Mississippi*, . . . Miss. . . ., 171 So.2d 129 (1965).

The aim and purpose of the law is to obtain juries which truly represent a cross-section of the community, but there is no constitutional requirement that such juries represent the proportional strength or exact percentage of the various components of the population. *Swain v. Alabama, supra; Fay v. New York, supra; Cassell v. Texas, supra; Brown v. Allen, supra; Hoyt v. Florida*, 368 U.S. 57; *Scott v. Walker, supra.* As stated in the *Swain* case, "Neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group."

The appellants charge in their complaint that Negro citizens possessing all the requisite qualifications of jurors and none of the disqualifications have been and are now being arbitrarily, intentionally and systematically excluded from jury service in Jefferson County, Alabama. In addition, the complaint charges that the Negro appellants and all others similarly situated have been and are now being discriminated against in the organization of juries in Jefferson County solely on account of their race or color, and that the methods utilized in the selection of names of Negroes to be placed on the jury rolls and in the jury boxes by the appellee Board members is highly irregular, arbitrary and contrary to the Constitution and the laws of the State of Alabama and of the United States.

The prayer for relief seeks an injunction against appellees restraining them from failing or refusing to place the names of all qualified persons on the jury

rolls and in the jury boxes in Jefferson County solely on account of their race or color, and from utilizing any names presently contained in the jury boxes or on the jury rolls for jury duty until such time as the names of all Negroes qualified for jury duty shall have been placed in the boxes and on the rolls.

The facts are somewhat complex and involve the Birmingham Division and the Bessemer Cut-Off Division (Bessemer Division) of the Circuit Court, which is the state trial court of record. Before discussing the facts in detail, it is appropriate to comment on the composition and actions of the Jury Board.

I.

The Jury Board and Its Selection Techniques:

The general provisions with respect to juries and the jury commissions of the several counties of the State of Alabama are found in Title 30, Sections 1-100, Code of Alabama, 1940 (Recomp. 1958). Except for certain general provisions, the matter is largely regulated in Jefferson County by Title 62, Sections 196-228, Code of Alabama, 1940 (Recomp. 1958). In Jefferson County, the body charged with the selection of jurors is called a "Jury Board" whereas, in other counties it is termed a "Jury Commission." With some exceptions which are not important to our consideration, the functions of these agencies are essentially the same, the difference being in name only. In Jefferson County state law requires this Board to obtain the names of male citizens between the ages of 21 and 65 years, Title 62, Section 199, Code of Alabama, 1940 (Recomp. 1958). Under Title 62, Section 200 of the Code, the Jury Board

is deemed to have performed the duties required of it by law when it has prepared a jury roll otherwise in compliance with law, consisting of at least six percent of the population of the county in accordance with the last Federal Census. According to the 1960 Federal Census figures, there were 106,409 white males (71%) and 44,864 non-white males (29%) between the ages of 21 and 65 in Jefferson County. The county lies within the 10th Judicial Circuit of Alabama and for purposes of judicial administration, is divided into the Birmingham Division and the Bessemer Division. Separate jury rolls are maintained in each division, although both are compiled by the appellee Board.

In the year 1962, 43,837 names were listed on the jury roll for the Birmingham Division, and 8,892 on the jury roll for the Bessemer Division, making a total figure for the county of 52,729. Six percent of the total population of Jefferson County is 33,092. Thus, the jury rolls contain several thousand names in excess of the six percent required by state law.

In compiling the jury rolls for both divisions, the Jury Board relies primarily on a house-to-house survey but sometimes employs the telephone directory, city directory and tax records. Voter registration lists are rarely if ever utilized by the Board because of the paucity of essential information contained on such lists, and because qualifications to vote and qualifications to serve on the jury are different. In the rural areas of the county, local storeowners, postmasters and other persons in or near the specific area under survey are consulted. The personal canvass of predominantly urban neighborhoods is conducted by the Clerk of the Jury Board, his deputy, and two to five

white female assistants. The female assistants cover the white neighborhoods while the Jury Board Clerk and his male deputy make a house-to-house survey in the Negro neighborhoods. The canvassers attempt to determine the names, addresses, occupations and dates of birth of male citizens between the ages of 21 and 65. If no one is at home when a canvasser appears, a stamped, self-addressed postcard is left at the house to be completed with pertinent information and mailed back to the Jury Board.[4]

The Jury Board Clerk testified that many Negroes in the low-income areas of the county were uncooperative and evasive when interviewed, thus making information difficult to obtain. Sometimes it was necessary to canvass five or six blocks to obtain two or three names. He estimated that less than five percent of the postcards left in such areas were returned to the Jury Board, while up to f i f t y percent were returned from white and "well-to-do" Negro areas. The house-to-house survey is made every two years, usually beginning in May. Thirteen to fourteen months are necessary to complete the s u r v e y. Although no

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[4]The face of the postcard contains the following information: 1. Full Name, 2. Residence Address, 3. Business Address, 4. Occupation, 5. Date of Birth, 6. Place of Birth, 7. Remarks. At the bottom of the postcard is the following statement:

> "Dear Sir: Will you be kind enough to fill out the answers to above questions, and mail this stamped card at once. This information will be of great value in our filling the jury box. If you know of any reason why you are not eligible to serve on the jury will you note it under 'Remarks.'"
>
> /s/ James F. Cheatwood
> Clerk, Jury Board

The card is addressed to:

> "Jefferson County Jury Board
> 311 Court House
> Birmingham 3, Alabama"

particular canvassing pattern or technique is followed, the Clerk testified that he tried to obtain a fair representation of each section of the county. He was not sure that every district of each precinct was surveyed, nor could he state what percentage of homes were visited within a precinct.

As the names are collected, they are recorded on worksheets and thereafter are checked for disqualifying factors. The names of those found eligible are then placed on the jury roll of each division. A card to be used in placing a name in the jury box is then prepared and filed until such time as the filling of the box takes place. Neither the worksheets, the jury rolls, nor the jury cards designate race, and no racial count is kept of the names to be placed in the jury box. Names contained on past jury rolls are brought forward and used in succeeding rolls. When a person has actually served on a jury, his name is removed for a two-year period.

In addition to the above procedure, the Jury Board Clerk, in order to obtain a wider and more representative cross-section of names, sends letters to prominent Negro citizens in the community prior to each filling of the jury box. These letters request the names, addresses, occupations and dates of birth of qualified persons.[5] Attached to the letters is an infor-

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[5]The following is the format of the letter sent to Negro community leaders:

"May 10, 1960

Name
Address
Dear Sir:

Will you please send us a list of the names, occupations, and addresses of the men of this County who are

mation blank designated "Jefferson County Jury Board Information List." The "Information List" has vertical columns which designate "Full Name", "Residence Address," "Business Address," "Occupation," "Date of Birth," and "Place" of birth. Nineteen lines are contained on each information list for the names of prospective jurors. The Clerk testified that these letters and information blanks were sent only to Negroes because of the continued difficulty in otherwise obtaining qualified Negro names for the jury roll. Few replies were received from the Negro addresses. Of the 88 letters mailed in 1962, for instance, there were only 9 responses. The mailing of these letters has been a consistent practice.

The Record indicates that a substantial number of white citizens, but very few Negroes, made inquiries to the Jury Board to determine whether they were listed on the jury rolls. If persons thus making in-

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eligible for jury service, and whom you know will make good jurors.

Please give the matter your careful consideration and select only such men as you would want to sit on the jury which might be about to pass on a case *involving your own life, liberty or property.* We feel that your interest *in good government* and in *equal and impartial justice* will cause you to take this trouble.

We are enclosing herewith information blank to fill out. No person must be selected who is under twenty-one or over sixty-five, or who is an habitual drunkard, is unfit to discharge the duties of a juror, or cannot read or write or who has ever been convicted of any offense involving moral turpitude. When this information is completed, mail it to this office.

Thanking you for your interest, we are

Very truly yours,
JEFFERSON COUNTY JURY BOARD
James F. Cheatwood
Clerk" (Emphasis added)

quiries are not so listed, they are then placed on the rolls if they meet the requisite qualifications.

II

The Role of the Jury Board Members in Filling The Box:

The Jury Board meets on the last Tuesday in August every two years to refill the divisional jury boxes. The obtaining of information and the selection of jurors for the rolls, however, is a continuing process, with a continuous purging of the same. More than twenty categories of individuals are exempt from jury duty, based upon the nature of the employment of the individuals involved. Title 30, section 3, Code of Alabama, 1940 (Recomp. 1958). At this meeting the Jury Board members take names of jurors contained on the jury roll and place them in the jury box for the respective divisions, excepting those persons who have recently served, those over-age, and those who are otherwise disqualified. The new jury roll, therefore, does not conform to the next preceding roll because of this continuous purging process. Jury rolls prior to 1953 have been burned. Once the jury box has been refilled for the respective divisions, it is then delivered into the custody and care of the presiding judge of the Birmingham and Bessemer courts. Thereafter, the Board members and the Jury Board Clerk have no further responsibility in the jury selection process.

III

Selection Process of Grand and Petit Juries:

(A) The Birmingham Division:

Some three to four weeks before the jury docket is set for call, the presiding judge d r a w s as many names from the Birmingham Division jury box as he deems necessary to provide sufficient j u r o r s, both grand and petit. These names are drawn at random from a large box after the cards containing the names have been thoroughly mixed. The presiding judge testified that there is no racial segregation of the cards in the box to the best of his knowledge and none is evident. At the drawing, the judge has in his presence his clerk and an assistant. As the cards are drawn they are placed on a table and stacked in groups of ten each. Once the cards are properly stacked, they are turned over to the Clerk who prepares a venire list and gives it to the county sheriff for service of subpoenas upon the designated individuals. The jurors subpoenaed then report to the jury assembly room on the fifth floor of the courthouse at the appointed hour and date to await their call in respective cases. Shortly after the jurors arrive in the jury assembly room, they are organized and s w o r n in by the presiding judge or another judge of the circuit court. The cards containing the names of the jurors are then placed in another small box and a mimeographed list of these names is compiled.

When a jury is needed for trial, the trial judge sends for the small box containing the cards of the present venire and draws at random the names of 24 to 28

persons from it in the presence of the lawyers in the case. There is only one box of this type for the Birmingham Division, but each circuit judge in the division has a key to it. There are several trial judges in the Birmingham Division and each judge uses the last mentioned box as and when cases arise necessitating a jury. The names of the persons so drawn are given to the jury room bailiff who, in turn, takes the cards back to the jury assembly room and instructs the 24 to 28 jurors, as the case may be, to proceed to a designated courtroom. The lawyers in the case then proceed to interrogate the venire and exercise appropriate strikes. As many as six Negroes have appeared on the panels of twenty-four summoned from the jury assembly room in the Birmingham Division. The highest estimate of Negroes present in the jury assembly room itself has been placed at 18 to 20 persons.

When a grand jury is needed in the Birmingham Division, the presiding judge draws 18 names from the same jury box from which the petit jurors are drawn. These names, likewise, are drawn at random. The largest number of Negroes to serve on a Birmingham Division grand jury has been three according to the Circuit Solicitor. Almost all Birmingham Division grand juries include some Negroes.

(B) **The Bessemer Division:**

Approximately 30 days before the call of the jury docket, the presiding judge of the Bessemer Division draws eighty names (in certain types of cases a larger number may be drawn) from that Division jury box, in the presence of the court clerk, for petit jury serv-

ice. The clerk then prepares a venire list which he delivers to the sheriff. The sheriff then serves subpoenas on the named individuals and at the appointed hour and date they report to the Bessemer courthouse for jury duty. One of the circuit judges or the presiding judge then organizes them, swears them in and they then await a call.

Judge Ball testified that the largest number of Negroes he had seen on any venire in the Bessemer Division was 7 or 8. When asked whether any racial segregation is practiced in the Bessemer court, the judge replied: "Well, yes. We put them on, if it comes out that way, on jury number four." It appears that the total Bessemer Division venire is divided into separately numbered petit jury panels of 12 persons each, and Negroes called for jury duty are generally placed on Petit Jury Number 4, although the record is silent as to exactly how such a racial determination is made.

Few Negroes appear to have been called for jury duty in the Bessemer Division. The evidence reveals that exactly the same standards were applied by the Jury Board in the selection of prospective jurors in the Bessemer Division as were applied in the Birmingham Division, although in his final order, the District Judge found that "Negroes seldom sit on the trial of cases . . . in the Bessemer Cut-Off." The Record as a whole amply supports the inference that few Negroes if any have actually served on petit juries, although Negroes have comprised as much as ten percent of those on the panels from which the petit juries have been selected.

When a grand jury is needed in Bessemer, the clerk takes the Bessemer Division jury box to the courtroom. There the judge unlocks the box and draws therefrom at random 35 to 40 names. The clerk then arranges the cards so drawn in alphabetical order and prepares a typed venire list, which he delivers to the sheriff. When court convenes, the names of the jurors who appear are placed in a hat, shuffled, and 18 names are drawn for grand jury duty. The remainder of the veniremen are excused. The District Judge also found that "Negroes seldom . . . serve on grand juries in the Bessemer Cut-Off." Testimony indicated that one Negro sat on a Bessemer grand jury in 1957, but that none has served since that date.

IV

This appeal raises the question whether the Jury Board of Jefferson County, Alabama, as a Board and its duly constituted members, individually, are enforcing and maintaining a policy, custom or usage which militates against fair jury selection procedures as protected by the United States Constitution and related statutes, and the Constitution and statutes of Alabama.

After a careful and cautious examination of the entire record, the briefs, and the contentions of the parties made on oral argument, we reach the firm conclusion that the findings of the trial court are amply supported by substantial evidence, and that the court applied the correct legal standards to the facts found.

The court was amply justified in concluding that the plaintiffs failed in their proof.[6]

Appellants attempted to show by various witnesses that a plan, scheme, or design was being employed by the appellee Board in an effort to discriminate against the Negro population of Jefferson County in regard to jury selection. They concede, however, that the Jury Board employs the proper technique in selecting jurors. In their brief appellants state:

> "A Survey or canvass or sample system of juror name selection is not only a proper but is also a preferred technique which should end the systematic exclusion of racial or other groups from jury rolls."

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[6]Although the Government in its brief as amicus curiae suggests that the case be remanded for further hearing, the brief forthrightly admits that there was an insufficiency of the evidence. We quote from the brief:

> "The difficult problem in this case is that a critical link in the evidence — the racial composition of the jury boxes — is missing. If for example the plaintiff could have proved that the jury boxes contain extremely low percentages of names of Negroes, or that some precincts heavily populated with Negroes are grossly underrepresented, these facts would cast considerable doubt upon the credibility of the testimony of members of the Jury Board explaining their system for selection. If on the other hand the proof showed that there was a substantial or reasonable proportion of names of Negroes in the jury boxes the plaintiff would lose his case as to these defendants.
>
> "As the record stands, this Court could conclude that the plaintiff had failed in his proof, since the racial composition of the jury boxes was not proved."

> "The Jury Board of Jefferson County, Alabama, employs the proper technique of juror selection; the fact that it did not correctly use it should not detract from the basic soundness of the method itself, one that can and should be used in state and federal courts across the land."

Rather than systematic exclusion (which also embraces token systematic inclusion) of Negroes from the jury rolls of Jefferson County, we are convinced that the record fails to show a lack of good faith on the part of jury officials to obtain qualified Negroes for jury service. The system used has not worked perfectly[7] in every instance, but the Jury Board has not allowed racial considerations to poison their jury selection process according to the record before us. The record reflects a good faith, bona fide effort on the part of the Board to give the Negro citizens of Jefferson County at least an equal, if not a privileged opportunity, to be called for jury service.[8]

It may be that Negro canvassers should be employed to assist in canvassing the Negro community. Counsel for appellees was interrogated on oral argument with respect to this very question. He replied that canvassers were obtained through the civil service system applicable in Jefferson County; and that

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[7]The opinion in *Swain* states: "But an imperfect system is not equivalent to purposeful discrimination based on race."

[8]In Thomas v. Texas, 212 U.S. 278, 53 L.Ed. 512, 1909, the court concluded:

> "If they fairly and honestly endeavored to discharge their duty, and did not in fact discriminate against the Negro race in the selection of the jury lists, the Constitution of the United States has not been violated."

there were no Negro applicants for such position. There was some indication by counsel that it might be possible to arrange for the employment of Negro canvassers through some temporary arrangement until qualified Negroes apply and are certified for employment through the civil service system. Such a procedure could possibly result in obtaining better cooperation from qualified Negroes. For reasons not apparent from the record, it is evident that a large proportion of the Negro community is either uninterested in jury service, or being interested, does not avail itself fully of the opportunity to render jury service. The techniques used by the Jury Board have made the opportunity available.

The record does disclose that Negroes seldom sit on petit or grand juries in the Bessemer Division. We do not approve the situation which the record shows to exist in the Bessemer Division. However, the record fails to show any connection whatever between this fact and the performance of their duties by the members of the Jury Board and its Clerk. As the trial court pointed out, the appellees have nothing to do with the selection of jurors to serve on petit and grand juries after their names are placed on the jury rolls. The trial court observed that it could not grant relief against parties not before it, or grant relief in areas over which the appellees had no jurisdiction or right to intervene. Accordingly, the trial court concluded that the action of the Jury Board should not be controlled by injunction when the right to redress appeared to be elsewhere. We quote from the findings and conclusions of the trial court relating to the Bessemer Division:

"(5). Negroes seldom sit on the trial of cases or serve on grand juries in the Bessemer Cut-Off.

(6). In the organization of the jury week-by-week Negro jurors are assigned to Jury 4.

Once the jury box has been filled possession is surrendered to the presiding judge of the court. These defendants have nothing whatever to do with the summoning of jurors for duty, drawing their names from the box, excusing them from service after they have been summoned, assigning them to numbered juries, or selecting those who shall serve on the grand jury or on the trial juries. The number of peremptory challenges in both civil and criminal cases is fixed by statute. The exercise of such peremptory challenges rests exclusively with the parties.

Any disparity between Negro and white jurors resulting from the summoning, drawing, excusing, assigning or selecting of jurors cannot be attributed to these defendants.

The court does not find evidence even in the presence of some disparity in numbers of those actually serving which is sufficient to establish discrimination against eligible Negroes in the formulation of the jury roll and in the filling of the jury box.

It hardly need be said that the Court cannot grant relief against parties not before it or

grant relief in areas over which these defendants have no jurisdiction or right to intervene, and their actions should not be controlled by injunction when the right to redress appears to lie elsewhere."

It is appropriate to state that our conclusion in this case does not preclude the granting of relief in any future proceedings in which racial discrimination of a systematic nature in the jury selection process is established by adequate proof.

The judgment is AFFIRMED.

JUDGMENT

(Number and Title Omitted)

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Orzell Billingsley, Sr., C. Herbert Oliver, J. S. Phifer and Abraham Woods, Jr., be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

April 5, 1966

Issued as Mandate: April 27, 1966

APPENDIX B

STATUTES RELATING TO THE OPERATION OF THE JURY SYSTEM IN JEFFERSON COUNTY, ALABAMA

From Title 30, Code of Alabama 1940 (Recomp. 1958)

§3. *Persons exempt from jury duty.* — The following persons are exempt from jury duty, unless by their own consent: Judges of the several courts; attorneys at law during the time they practice their profession; officers of the United States; officers of the executive department of the state government; sheriffs and their deputies; clerks of the courts and county commissioners; regularly licensed and practicing physicians; dentists; pharmacists; optometrists; teachers while actually engaged in teaching; actuaries while actually engaged in their profession; officers and regularly licensed engineers of any boat plying the waters of this state; passenger bus driver-operators, and driver-operators of motor vehicles hauling freight for hire under the supervision of the Alabama public service commission; railroad engineers, locomotive firemen, conductors, train dispatchers, bus dispatchers, railroad station agents, and telegraph operators, when actually in sole charge of an office; newspaper reporters while engaged in the discharge of their duties as such; regularly licensed embalmers while actually engaged in their profession; radio broadcasting engineers and announcers when engaged in the regular performance of their duties; the superintendents, physicians, and all regular employees of the Bryce hospital in Tuscaloosa county and the Searcy hospital in Mobile county; officers and en-

listed men of the national guard and naval militia of Alabama, during their terms of service and convict and prison guards while engaged in the discharge of their duties as such.

§20. *Jury roll and cards.* — The jury commission shall meet in the court house at the county seat of the several counties annually, between the first day of August and the twentieth day of December, and shall make in a well bound book a roll containing the name of every male citizen living in the county who possessed the qualifications herein prescribed and who is not exempted by law from serving on juries. The roll shall be arranged alphabetically and by precincts in their numerical order and the jury commission shall cause to be written on the roll opposite every name placed thereon the occupation, residence and place of business of every person selected, and if the residence has a street number it must be given. Upon the completion of the roll the jury commission shall cause to be prepared plain white cards all of the same size and texture and shall have written or printed on the cards the name, occupation, place of residence and place of business of the person whose name has been placed on the jury roll; writing or printing but one person's name, occupation, place of residence and of business on each card. These cards shall be placed in a substantial metal box provided with a lock and two keys, which box shall be kept in a safe or vault in the office of the probate judge, and if there be none in that office, the jury commission shall deposit it in any safe or vault in the court house to be designated on the minutes of the commission; and one of said keys thereof shall be kept by the president of the jury commission. The other of said keys shall be kept by a judge of a

court of record having juries, other than the probate or circuit court, and in counties having no such court then by the judge of the circuit court, for the sole use of the judges of the courts of said county needing jurors. The jury roll shall be kept securely and for the use of the jury commission exclusively. It shall not be inspected by anyone except the members of the commission or by the clerk of the commission upon the authority of the commission, unless under an order of the judge of the circuit court or other court of record having jurisdiction. (1939, p. 86; 1945, p. 496, appvd. July 7, 1945.)

§21. *Qualifications of persons on jury roll.* — The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment; but no person must be selected who is under twenty-one or who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror; or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder his name may be placed on the jury roll and in the jury box. No person over the age of sixty-five years shall be required to serve on a jury or to remain on the panel of jurors unless he is willing to do so. (1939, p. 86; 1943, p. 309, appvd. July 1, 1943.)

§24. *Duty of commission to fill jury roll; procedure; etc.* — The jury commission is charged with the

duty of seeing that the name of every person possessing the qualifications prescribed in this chapter to serve as a juror and not exempted by law from jury duty, is placed on the jury roll and in the jury box. The jury commission must not allow initials only to be used for a juror's name but one full Christian name or given name shall in every case be used and in case there are two or more persons of the same or similar name, the name by which he is commonly distinguished from the other persons of the same or similar name shall also be entered as well as his true name. The jury commission shall require the clerk of the commission to scan the registration lists, the lists returned to the tax assessor, any city directories, telephone directories and any and every other source of information from which he may obtain information, and to visit every precinct at least once a year to enable the jury commission to properly perform the duties required of it by this chapter. In counties having a population of more than one hundred and eighteen thousand and less than three hundred thousand, according to the last or any subsequent federal census, the clerk of the jury commission shall be allowed an amount not to exceed fifty dollars per calendar year to defray his expenses in the visiting of these precincts, said sum or so much thereof as is necessary to be paid out of the respective county treasury upon the order of the president of the jury commission. (1939, p. 86.)

§25. *Separate rolls for courts in territorial subdivisions.* — Whenever a court requiring grand and petit juries, or petit juries, is established for and held in a territorial subdivision of the county, the jury commission shall make and keep a separate roll and make a

separate box for that court and territorial subdivision, on which roll and in which box only the names of jurors residing in that territory shall be placed, which box shall be kept by the clerk of said court and the key thereof by the judge of said court, and all jurors for that court shall be drawn by the judge of said court as provided in this chapter from the separate jury box provided under this section, and shall be summoned as provided by law summoning jurors otherwise drawn. The names of jurors whose names are required to be placed on the roll and in the box in this section provided for, shall not be placed on any other roll nor in any other box nor shall any such person be authorized or required to serve as a juror in any court outside of said territorial subdivision. If there is more than one court requiring grand and petit juries, or petit juries established for and held in such territorial subdivision of the county, all of such courts shall procure their juries from the box in this section provided for, and this section is intended to apply to any division of a court that is held in such territorial subdivision, including the probate court. It is not the object or effect of this section to repeal or affect any local law. (1939, p. 86.)

§30. *(8616) (7248) Drawing grand and petit juries from jurybox.* — At any session of a court requiring jurors for the next session, the judge, or where there are more than one, then any one of the judges of the court shall draw from the jury box in open court the names of not less than fifty persons to supply the grand jury for such session and petit juries for the first week of such session of the court, or if a grand jury is not needed for the session at least thirty persons, and as many more persons as may be needed

for jury service in courts having more than one division for the first week, and after each name is drawn it shall not be returned to the jury box, and there shall be no selection of names, and must seal up the names thus drawn, and retain possession thereof, without disclosing who are drawn until twenty days before the first day of the session of the court for which the jurors are to serve, when he shall forward these names by mail, or express, or hand the same to the clerk of the court who shall thereupon open the package, make a list of the names drawn, showing the day on which the jurors shall appear and in what court they shall serve, and entering opposite every name the occupation of the person, his place of business, and of residence, and issue a venire containing said names and information to the sheriff who shall forthwith summon the persons named thereon to appear and serve as jurors. (1909, p. 305.)

§33. *(8619) Method of summoning jurors; returns* — The sheriff shall execute every order to summon jurors, except as otherwise provided herein, by giving personal notice to every such person, or by leaving a written notice at the place of his residence with some member of his family, or some person residing in the same house, at least two days before the day appointed for the service of the juror in court, which order must be returned to the clerk of the court when it issued with the proper return thereon showing the manner of service, by the sheriff, on or before the day appointed for the appearance of the juror. (1909, p. 305.)

§34. *(5060) (7468) (5101) (3924) (4121) (3565) (25) Packing jury* — Any sheriff or other officer having a discretion in summoning jurors, who summons any

person with intent to produce a result favorable to any party having a cause in the court in which such person is summoned, must, on conviction, be imprisoned in the penitentiary for not less than two nor more than five years.

§35. *(5061) (7469) (5102) (3925) (4123) (3570) (29) Connivance of sheriff.* — Any sheriff who connives at the commission of the offense prohibited by the preceding section, by any constable, bailiff, or deputy sheriff, must, on conviction, be imprisoned in the penitentiary for not less than two nor more than five years.

§36. *(8620) Sheriff failing to summon guilty of contempt.* — If the sheriff or any deputy shall negligently fail to summon any person to serve as a juror whom he is commanded to summon, he shall be held and deemed guilty of a contempt of court, and shall be fined not more than one hundred dollars in every case where the person is not so served, and he may also be imprisoned in the county jail for not more than five days. (1909, p. 305.)

§37. *(8621) Failure to summon; mistake of name not ground for quashing.* — The return of any such person as "not found" shall be prima facie evidence of negligence on the part of the sheriff, or deputy making the return and he shall be punished by the court unless the court is reasonably satisfied from evidence produced that he was not negligent. If the sheriff fails to summon any jurors drawn, or any person summoned fails or refuses to attend the trial, or there is any mistake in the name of any person drawn, or summoned, none or all of these grounds shall be sufficient

to quash the venire, or continue the cause. (1909, p. 305.)

§38. *(8622) Hearing of excuses; empaneling and organizing grand and petit juries.* — The court shall require all persons named in the venire to be called, and shall then hear all excuses and claims of exemptions and qualifications, and after passing upon all of the excuses or claims, shall cause the names of all the jurors in attendance upon the court on that day, and who have not been excused by the court, to be written on separate slips of paper, or cards and placed in a hat or box, and thereupon the judge of the court must, in open court, draw from the hat or box, at sessions requiring grand juries, the names of eighteen jurors who shall be empaneled and sworn as the grand jury for the sessions of the court, provided that only one grand jury is authorized by law for that session; but if more than one grand jury is authorized by law for such session, then said jurors, so empaneled, shall be the first grand jury for said session, and any subsequent grand jury, or grand juries for such session as is now or may hereafter be authorized by law must be drawn, summoned, sworn and empaneled, as provided in this chapter during the said session, and the venire for same may contain such number of names as the judge may deem necessary. The judge must then proceed to draw from the hat or box, the names of twelve jurors who shall be empaneled and sworn as petit jury no. 1, and in like manner the judge must draw and empanel and swear petit jury no. 2, and when necessary, as many more jurors as the judge or judges of the court may deem proper, all of whom shall serve as petit jurors for that week, unless discharged sooner by the court, and may be required to serve till any case on

trial is determined. If petit juries are needed for any week or weeks of the sessions, after the first week, the judge or any two judges of said court, if there is more than one judge, shall, in like manner at such times as to him or them may seem best, draw from the jury box such number of names, not less than thirty, for each of such subsequent weeks, as will in the discretion of such judge or judges, be sufficient for the week for which same are drawn. (1919, p.1039.)

§47. *(8689) (7307) (5046) Defaulting juror punished for contempt; proceedings.* — If any person summoned as a grand or petit juror shall fail to obey such summons without good excuse, to be determined by the court, he shall be deemed guilty of a contempt of court; and if no sufficient excuse be rendered for him at the time of his default, a rule shall issue to him to show cause why he shall not be adjudged guilty of such contempt and punished accordingly; and if he shall fail at the next session after the service of such notice to render such excuse, he shall be fined by the court not more than one hundred dollars, and may be imprisoned in the county jail for not more than ten days. In courts holding sessions longer than thirty days the rule shall be made returnable twenty days after it issues, and the person in default shall have ten days after service in which to appear and render his excuse.

§48. *(4889) Unlawfully placing in or withdrawing names from jury box; penalty.* — Any person who shall unlawfully place in or withdraw from the jury box, any name or names of persons, or destroy, conceal or remove such jury box, or place on or erase from the jury roll, the name of any person, or destroy, mut-

ilate, conceal or remove such jury roll, shall be guilty of a felony, and upon conviction, shall be sentenced to the penitentiary, or to hard labor for the county for not less than six months, nor more than two years, to be fixed by the court. (1909, P. 305.)

§49. *(5070) (7478) (5098) (3921) Wilful neglect of duty by jury commissioner or officer.* — Any jury commissioner or other officer who willfully or negligently fails to discharge any duty required of him by law in the drawing or selecting of a juror or jury, or who draws or selects a juror or jury in any manner or order other than that prescribed by law must, on conviction, be fined not less than fifty nor more than one thousand dollars.

§50. *(5071) (7479) (5099) (3922) Corruptly influencing jury commissioner or officer.* — Any person who attempts, otherwise than by bribery, to influence any jury commissioner, or any other officer charged with the execution of any duty concerning the selecting, drawing, summoning, impaneling, or organizing of jurors or juries, must, on conviction, be fined not more than one thousand dollars, and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than twelve months.

§51. *(5072) (7480) (5100) (3923) (4766) (4093) (543) Drawing jury unfairly; penalty.* — Any person who does an act calculated to affect the fair drawing of a jury, and with intent to affect the same must, on conviction, be fined not less than two hundred, nor more than one thousand dollars, and may also be imprisoned, in the county jail for not more than six months; and if such person is a judge of probate, sheriff, or

clerk of the circuit court, or jury commissioner, or a member of a board of revenue, or a county commissioner, his office is thereby vacated, and must be filled as in other cases of vacancy, on such conviction being certified to the appointing power by the presiding judge or the clerk of the court in which it is had.

§72. *(8665) Grand juries; how and when empaneled.* — There shall be empaneled in every county having less than fifty thousand population, not less than two grand juries in every year, and when they have completed their labors, in its discretion the court may permit them to take a recess subject to the call of the judge of the circuit court, or chief justice of the supreme court, and may be reassembled at any place where the circuit court of the county is to be held. In all counties having over fifty thousand population, there shall be empaneled not less than four grand juries in every year. (1915, P. 809.)

From Title 35, Code of Alabama 1940 (recomp. 1958):

§11. *Exemption from poll tax, street tax and jury duty.* — Owing to liability to call for military duty during their term of service, every officer and enlisted man of the national guard and naval militia of Alabama shall be exempt from poll tax, road duty, street tax and jury duty during his active membership, any local or special laws to the contrary notwithstanding; provided that every person who shall have served an aggregate of twenty-one years in the active national guard or naval militia of Alabama shall be thereafter forever exempt from poll tax, road duty, street tax and jury duty by reason of such service, any other laws to the contrary notwithstanding. The command-

ing officer of any company, troop, battery, or any similar organization, shall furnish each member of his command applying for same such certificate of membership as may be prescribed by the adjutant general, signed by such commanding officer, which certificate shall be accepted by any court as proof of exemption as provided by this law. Such certificates shall be issued to every officer and enlisted man, as aforesaid, under such regulations and upon such forms as may be prescribed and provided by the adjutant general. The said certificates shall be effective, as to poll tax, for the poll tax year for which same is issued without regard to dates prescribed for payment of poll tax, and as to the other exemptions provided herein, the same shall be effective for the calendar year in which it is issued. The commanding officer of a division, brigade, regiment or separate battallion shall issue similar certificates to each of his field officers, commissioned and enlisted staff, and the adjutant general with the approval of the governor shall issue similar certificates to each general officer of the Alabama national guard, and to each regimental commander not in the brigade or division of a general officer of the line of the Alabama national guard, and to each commissioned officer, warrant officer and enlisted man of the national guard whose immediate tactical commanding officer is not a member of the Alabama national guard.

From Title 62, Code of Alabama 1940 (recomp. 1958):

§199. *Duty to procure all names.* — The jury board shall obtain as nearly as practicable the name of every male citizen over the age of twenty-one and under the age of sixty-five years together with their occupa-

tion and place of residence and place of business. (1931, p. 455.)

§200. *Where board meets; make roll, etc.* — The jury board shall meet in the court house of the county and make in a well bound book a roll, carrying so far as is practicable, the name of every male citizen living in the county who possesses the qualifications herein prescribed and who is not exempted by law from serving on juries. The roll shall be arranged alphabetically and by precincts in their numerical order and the jury roll, to take the testimony of witnesses, to require the production of any books, papers, or documents and generally to do and perform whatever acts necessary to establish to their satisfaction that the said jury roll conforms to all legal requirements. The jury board shall have performed the duties required of it by law when they shall have prepared a jury roll otherwise in compliance with law consisting of the names of qualified jurors in number equal to at least six per cent of the population of the county in accordance with the last federal census. (1931; p. 455.)

§201. *Who on jury roll; etc.* — The jury board is charged with the duty of seeing that the name of every person possessing the qualifications prescribed herein to serve as a juror and not exempted by law from jury duty, is placed on the jury roll and in the jury box and they may summon and cause to attend before them any person within the county and examine him on oath touching such name, residence, occupation and qualifications of any person residing in the county. The jury board must not allow initials only to be used for the juror's name, but one full Christian name or given name shall in every case be used and

in case there are two or more persons of the same or similar name, the name by which he is commonly distinguished from the other person of the same or similar name shall also be entered as well as his true name. The jury board shall require the clerk of the board to scan the registration list, the lists returned to the tax assessor, any city directory, telephone directory and any and every other source of information from which he may obtain information, and to visit every precinct at least once a year to enable the jury board to properly perform the duties required of it by law. (1931, p. 455.)

§202. *When refill box.* — Whenever it shall appear to the judge of the circuit court or court of like jurisdiction that the jury box is so nearly exhausted as to require refilling, he shall notify the jury board and the said board shall thereupon proceed to refill the box as herein provided. (1931, p. 455.)

§228. *Excuses of jurors.* — Any person summoned for jury duty who is excused from serving as a juror during the period of time for which he has been summoned to serve, may in the discretion of the judge excusing him and by his written order, be required to serve during some subsequent specified week of court. If at the time of the organization of juries, it appears that a greater number of persons are available for jury duty than the needs of the court require, the court may by lot excuse such number of jurors as are not needed, and may, in its discretion and by written order require such excused persons to serve during some specified subsequent week of court. No juror who is excused pursuant to the provisions of this section shall be entitled to his mileage fee, and per diem fee for

the day on which he originally appears and is excused; and for his services during the subsequent week in which he is required to serve he shall receive the same fees as if he had originally been summoned to serve during that week. The card bearing the name of an excused juror who has been required to serve during such subsequent week shall not be returned to the jury box, but shall be placed by the clerk with the cards bearing the names of persons drawn and summoned for such subsequent week, and thereafter dealt with the same as though such excused juror had been originally summoned for such subsequent week, except that no additional summons need be issued to such excused juror. (1936, Ex. Sess., p. 6.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 408

ORZELL BILLINGSLEY, SR., C. HERBERT OLIVER, J. S. PHIFER AND ABRAHAM WOODS, JR., for themselves, jointly and severally, and for all others similarly situated,

Petitioners,

versus

GEORGE W. CLAYTON, as President of the Jury Board of Jefferson County, Alabama; MRS. FRED BATSON, as Vice President of the Jury Board of Jefferson County, Alabama; WALTER E. PALMER, as Associate Member of the Jury Board of Jefferson County, Alabama; JAMES F. CHEATWOOD, as Clerk of the Jury Board of Jefferson County, Alabama; and each of their successors in office,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners,

versus

GEORGE W. CLAYTON, as President of the Jury Board of Jefferson County, Alabama; MRS. FRED BATSON, as Vice President of the Jury Board of Jefferson County, Alabama; WALTER E. PALMER, as Associate Member of the Jury Board of Jefferson County, Alabama; JAMES F. CHEATWOOD, as Clerk of the Jury Board of Jefferson County, Alabama; and each of their successors in office,

Respondents.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

QUESTIONS PRESENTED

I.

WHETHER, WHERE PLAINTIFFS IN A CLASS ACTION ALLEGED THAT RESPONDENTS, IN MAKING UP JURY ROLLS AND JURY BOXES, SYSTEMATICALLY

EXCLUDED NEGROES THEREFROM, BUT FAILED TO PROVE THE NUMBER OF NEGROES ON SUCH ROLLS AND IN SUCH BOXES, THE BURDEN WAS CAST ON THE RESPONDENTS TO MAKE SUCH PROOF.

II.

WHETHER MERE PROOF THAT FEW NEGROES ACTUALLY *SERVED* ON GRAND AND PETIT JURIES MAKES OUT A PRIMA FACIE CASE THAT NEGROES WERE SYSTEMATICALLY EXCLUDED FROM THE JURY ROLLS AND JURY BOXES.

III.

WHETHER, WHERE THE NAMES OF PERSONS PLACED ON THE JURY ROLLS ARE OBTAINED BY A HOUSE-TO-HOUSE CANVASS SYSTEM, AND NO RECORD OF THE RACIAL IDENTITY OF SUCH PERSONS IS MADE, THE JURY BOARD MUST PROVE SUCH RACIAL IDENTITY IN ORDER TO REFUTE ALLEGATIONS OF RACIAL DISCRIMINATION AND SYSTEMATIC EXCLUSION.

STATEMENT OF THE CASE

Four Negro Plaintiffs filed a class action in the United States District Court for the Northern District of Alabama against the three Members and the Clerk of the Jury Board of Jefferson County, Alabama, "and each of their successors in office," seeking a temporary restraining order, or, in the alternative, a preliminary injunction to be later made permanent, or, in the alternative, a special three-judge court to hear the cause and declare the rights of the Plaintiffs and

others similarly situated pursuant to Title 28, U. S. C. A., Section 2281. The Plaintiff, C. Herbert Oliver, is a resident of that part of the County known as the "Bessemer Cut-Off" (R. 22). The other Plaintiffs reside in the Birmingham Division of the County (R. 22). The Plaintiff, Orzell Billingsley, Sr., had a civil action pending in the Circuit Court of Jefferson County, which was to be tried when reached in proper order.

The Plaintiffs prayed that the court enter a Judgment or Decree declaring that "the policy, custom, or usage of the Defendant Board in refusing to place all qualified Negroes on the jury rolls and in the jury boxes, solely on account of race or color, is unconstitutional and in violation of the Fourteenth and Fifth Amendments to the United States Constitution" (R. 11); and enjoining and restraining Defendant Board Members, their agents, employees, successors, "and persons in active concert and participation with them" from failing or refusing to place the names of all qualified persons on the jury rolls and in the jury boxes solely on account of their race or color" (R. 11), and from "utilizing any names presently contained in the jury boxes or on the jury rolls of Jefferson County, Alabama, for jury duty in any court in such county until such time as the names of all Negroes qualified for jury duty therein shall have been placed in such jury boxes or on such jury rolls" (R. 11-12).

The Plaintiffs based their claims to the relief prayed for on allegations that the method of selection of the names of Negroes to be placed on the jury rolls and in the jury boxes of Jefferson County, Alabama, by the Defendant Board Members "is highly illegal and arbitrary and contrary to the method prescribed by the Constitution and Laws of the State of Alabama and of the United States of America" (R. 8), thereby depriving them, and others similarly situated, of rights guaranteed them by the Constitution and Laws of the

State of Alabama and by the Constitution of the United States; that there exists a system or practice in the drawing or organization of juries to serve in the County deliberately designed to discriminate against Negroes [*this is not attributed to the Members of the Jury Board or to its Clerk*]; and that one of the Plaintiffs (Billingsley) then had a civil jury case pending on the docket in the Circuit Court of the County (R. 8-9).

The general provisions, with respect to juries and jury commissions of the several Counties of the State of Alabama are found in Title 30, Sections 1-100, Code of Alabama 1940 (Recompiled 1958). Except for certain general provisions, the matter is largely regulated in Jefferson County by Title 62, Sections 196-228, Code of Alabama 1940 (Recompiled 1958). In Jefferson County, the body charged with the selection of names to be placed on the jury rolls and in the jury boxes is called a "Jury Board," whereas, in other Counties it is called "Jury Commission." In Jefferson County, the law requires (Title 62, Section 199) the Board to obtain the names of male citizens between the ages of 21 and 65. In other areas of the State, a person over 65 is not required to serve on a jury (Title 30, Section 21), but is not mandatorily excluded. Under Title 62, Section 200, the Jury Board is deemed to have performed the duties required of it by law when it shall have prepared a jury roll otherwise in compliance with law consisting of at least 6% of the population of the County in accordance with the last Federal Census. The Complaint and Motion for Preliminary Injunction do not allege that this has not been done.

The Complaint merely alleges that the jury rolls of the County contain "less than 5% of the names of the total number of Negro males eligible for jury duty in said County" (R. 7).

When the roll is made up and the box is filled, the box is

then delivered into the custody of the Presiding Judge of the Circuit Court. Under the general provisions of the law, the box is kept in the office of the Probate Judge, and the President of the Jury Commission keeps one of the keys to the box (Title 30, Section 20). In Jefferson County, the Jury box is filled every two years, and the obtaining of information and the selection of prospective jurors for the rolls is a continuous process, with a continuing purging of the same. Approximately 35 categories of individuals are exempt from jury duty, based upon the nature of the employment of the individuals involved (Title 30, Section 3, and Title 35, Section 11). The qualifications of jurors are prescribed in Title 30, Section 21.

None of the Plaintiffs alleges that he, himself, possessed the qualifications of a juror or that his name had not been placed on the jury roll or in the jury box. In fact, the evidence showed that all four are ministers, who, in practice, would normally be excused, and one is a teacher, subject to exemption from jury duty under Title 30, Section 3. Only one, Billingsley, alleges that he had any direct interest in the composition of the jury roll and jury box, and that was in connection with a suit pending in the State Circuit Court.

By virtue of Title 62, Section 201, the Jury Board is charged with requiring the Clerk of the Board "to scan the registration list, the list returned to the Tax Assessor, any city directory, telephone directory, and any and every source of information from which he may obtain information, and visit every precinct at least once a year . . ." (R. 80-81).

The 1960 Census reveals that there were 634,864 people in the County.[1] The jury rolls contained the names of 52,729 males, 43,837 being in the Birmingham Division, and 8,892 in the Bessemer Cut-Off. Six percent of the total population

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[1]. 1960 United States Census, Alabama Table 7, pages 2-13.

of the County is 38,092. Thus, the jury rolls contain 14,637 names in excess of 6% of the total population.

There was no testimony or evidence as to the percentage of each race between the ages of 21 and 65 eligible for jury service. Furthermore, there was no testimony or evidence as to the percentage of each race claiming exemptions.

On May 16 and 17, 1962, extensive testimony was taken and evidence presented in support of the Motion for a Temporary Restraining Order, and on June 7, 1962, the Court declined to issue a Temporary Restraining Order (R. 22).

On November 2, 1964, further testimony was given and evidence presented, and on December 2, 1964, the Court made additional Findings, adopted the Opinion previously filed on the Motion for Temporary Restraining Order, and denied all relief (R. 34-37).

On December 17, 1965, this case was argued before the United States Court of Appeals for the Fifth Circuit *en banc* and on April 5, 1966, by unanimous opinion, that Court affirmed the judgment of the District Court, the opinion being reported in 359 F. 2d 13.

The principal evidence with regard to the operations of the Jury Board and its Clerk was given in the testimony of Mr. James F. Cheatwood, who had worked for the Jury Board for fourteen years, the last four of which were as Clerk (R. 82), and the testimony of Mr. Billy Ray Whitley, who had been employed by the Jury Board since 1960 and had served as Clerk since July 17, 1964. The testimony of Mr. Cheatwood appears in the Record at pages 81-94, pages 276-353, and at pages 435-444. The testimony of Mr. Whitley appears in the Record at pages 445-451.

Mr. Cheatwood testified that his duties required him to visit every precinct in the County, which he did (R. 82);

that he was able to get more information from those persons residing in the high economic sections, and that they were not as evasive as others (R. 84); that he had no idea of the racial percentages of the areas surveyed (R. 85); that the same procedures were followed in Negro neighborhoods as in White neighborhoods in making surveys for the Jury Board (R. 89); that the city directory was used only as a check on spellings and other possible questions (R. 92); that the principal method of survey was house-to-house (R. 92); supplemented by visiting store owners and Postmasters in outlying areas and writing letters (R. 92-93); that it was sometimes impossible to tell by the address on a list whether a person was Negro or White (R. 93-94); that his surveys were always on an impartial basis (R. 81-94); that a survey was made every two years all over the County in order to fill the jury box properly without regard to race, creed or color; that the Jury Board is the policymaking and reviewing group; that since he had been Clerk of the Jury Board, they had always used a house-to-house survey system to make up the jury list; that the policy had not been changed; that they did use a voter list, city directory, or tax register, because such lists would not show age or physical disability, nor would such lists show present residence addresses; that in making the survey, if no one is at home, the person making the survey leaves a card at the house; that the staff places information gathered in the survey on daily worksheets; that such information is then checked to determine whether a person has been convicted of a crime or is otherwise disqualified; that the worksheets do not show who is White or who is Negro; that the cards placed in the jury box contain no racial identification; that it takes approximately 13 to 14 months to make a survey; that when the survey is being conducted, nine extra workers are hired to work full time for nine months; that they tried to get a cross-section of the county according to the economic standing of the people; that

in some small communities he would go to the Postmaster and request him to furnish the names of qualified male citizens over 21, regardless of race, color or creed; that he sent out more than 80 letters to Negro professional people requesting them to furnish names of qualified persons; that he got only nine answers to these letters; that he had more difficulty in making surveys in Negro neighborhoods than in White neighborhoods; that frequently the Negroes would either not give information or would not come to the door; that many of them were very evasive or vague; that this was especially true in the low economic class (R. 305-306); that he had tried calling on some of the addresses of the letters he had written; that he had no idea of the percentage on the jury roll who might be Negroes; that he could not tell by looking at the jury roll whether a person was a Negro or a White person except in very isolated areas; that he had caused articles to be published in the newspapers regarding the compilation of the jury rolls; that letters had been sent to attorneys for the Plaintiffs (R. 320-322) (Defendant's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 9A, 10, and 10A); that the response in the colored sections was less than 5%, whereas, the response from White sections was approximately 50% of the cards left; that sometimes he would have to walk as many as five or six blocks in alleys in colored sections to get the names of two or three men; that he has had thousands of White men come in the office and inquire about their names being in the box, but only two Negro men (R. 349); and that no distinction was made as to race in obtaining the names of prospective jurors to be placed on the jury roll and in the jury box (R. 276-353).

Mr. Billy Ray Whitley testified that he helped survey the Negro community and five temporary field agents surveyed integrated communities where Negroes and White persons were living in the same block; that in sparsely settled communities, the Clerk of the Board usually contacted store

owners and Postmasters to obtain names; that the Board still sent out letters seeking names; and that the policy had not changed (R. 367-385).

The 1960 Census reveals that there were 120,205 White males over 21 years of age and 51,961 non-white males over 21 years of age residing in Jefferson County; that between the ages of 21 and 65, there were 106,409 White males and 44,864 non-white males. Roughly, the ratio is 71% White and 29% non-white.

ARGUMENT

I.

WHERE PLAINTIFFS IN A CLASS ACTION ALLEGED THAT RESPONDENTS, IN MAKING UP JURY ROLLS AND JURY BOXES, SYSTEMATICALLY EXCLUDED NEGROES THEREFROM, BUT FAILED TO PROVE THE NUMBER OF NEGROES ON SUCH ROLLS AND IN SUCH BOXES, THE BURDEN WAS NOT CAST ON THE RESPONDENTS TO MAKE SUCH PROOF.

The Petitioners attempt to raise the question as to the burden of proof in systematic exclusion cases and seem to assume that the mere allegation of systematic exclusion of Negroes from the jury rolls and jury boxes and proof that a limited number of Negroes actually *served* on Grand and Petit Juries over a period of time in and of itself makes out a *prima facie* case of systematic exclusion of Negroes from the jury rolls and jury boxes and casts the burden on the Respondents to negative that fact.

It must be borne in mind that this suit was brought against the Members of the Jury Board and the Clerk of that

Board who are charged by law with certain functions in connection with the preparation of the jury rolls and jury boxes in Jefferson County, Alabama. It must also be borne in mind that the District Court, under general principles of law, was required to ascertain the facts as far as these particular Respondents were concerned and was limited in the relief which it could grant to the parties before the Court. The District Court could not, under any circumstances, hold these Respondents responsible for actions of persons acting independently of the Jury Board or of its Clerk.

Therefore, upon the examination of the Record, we are faced with the fact that the only thing that the District Court had to consider was whether or not the Members of the Jury Board and the Clerk thereof had been guilty of systematic exclusion of Negroes from the jury rolls and jury boxes of Jefferson County, Alabama.

An examination of the complaint and of the argument presented by Petitioners indicates that Petitioners feel that the law should be that each race should be proportionately represented on the jury rolls and in the jury boxes. As was well stated by Mr. Justice White in *Swain v. Alabama*, 380 U. S. 202, 13 L. Ed. 2d 759, 859 S. Ct. 824, 33 L. W. 4231:

> "Neither the jury roll nor the venire need by a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group."

The same idea was expressed in *Cassell v. Texas*, 339 U. S. 282, 286-287, 94 L. Ed. 839, 847, 70 S. Ct. 629, where the Court said:

> "Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation."

See, also, *Virginia v. Rives*, 100 U. S. 313, 322-323, 25 L. Ed. 667, 670-671; *Gibson v. Mississippi*, 162 U. S. 565, 40 L. Ed. 1075, 16 S. Ct. 904; *Thomas v. Texas*, 212 U. S. 278, 282. 53 L. Ed. 512, 513, 29 S. Ct. 383; and *Akins v. Texas*, 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1276.

The mere fact of inequality in the number of persons of a racial group selected for jury duty does not in itself show discrimination; there must be a purpose to discriminate which may be proved by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination. *Fikes v. State*, 263 Ala. 89, 81 So. 2d 303, 309-311, reversed on other grounds, 352 U. S. 191, 1 L. Ed. 2d 246, 77 S. Ct. 281; *Akins v. Texas*, supra; *Cassell v. Texas*, supra; *United States ex rel. Willie Seals, Jr., v. Wiman*, 304 F. 2d 53.

There is no evidence that the Members of the Jury Board or the Clerk applied different standards or qualifications to the Negro community than they did to the White community, nor was there any meaningful attempt to demonstrate that the same proportion of Negroes qualified under the standards administered by the Jury Board. An imperfect system is not equivalent to purposeful discrimination based on race. The burden of proof was not carried by the Petitioners in this case. *Swain v. Alabama*, supra.

Petitioners ignore entirely the almost total failure of the Negro leaders in the County to assist the Jury Board in any way in securing the names of qualified Negroes to be placed on the jury roll. They attempt to place the blame for the disparity of the numbers of those actually *serving* on Grand and Petit Juries on persons not before the Court. They refuse to lay the blame where it rightly belongs—that is, on their own people. As was pointed out by Judge Grooms, District

Judge, in his additional Findings of Fact and Conclusions of Law on December 2, 1964:

"Once the jury box has been filled, possession is surrendered to the Probate Judge of the County. These Defendants have nothing whatever to do with the summoning of jurors for duty, drawing their names from the box, excusing them from service after they have been summoned, assigning them to numbered juries or selecting those who shall serve on the Grand Jury or on a trial jury. The number of peremptory challenges in both civil and criminal cases is fixed by statute. The exercise of such peremptory challenges rests exclusively with the parties.

"Any disparity between Negro and White jurors resulting from the summoning, drawing, excusing, assigning, or selecting of jurors cannot be attributed to these Defendants."

Under the laws governing the Jury Board of Jefferson County, Alabama, the Jury Board is deemed to have performed its duties when it shall have prepared a jury roll otherwise in compliance with law consisting of at least 6% of the population of the County in accordance with the last Federal Census. The Complaint and the Motion for Preliminary Injunction and Permanent Injunction do not allege that this has not been done.

The Complaint merely alleges that the jury rolls of the County contain "less than 5% of the names of the total number of Negro males eligible . . . for jury duty in said County."

The statute does not even require the jury roll to contain at least 6% of the eligible *male* population, regardless of race or color, but only 6% of the *total* population. Naturally, therefore, the jury roll conceivably contains less than 6%

of the eligible *White* males as well as less than 6% of the eligible *Negro* males, since the percentage is calculated on the *total* population, which includes women and children as well as persons over 65 years of age, those who have been convicted of crime and others ineligible to serve.

The suggestion that *Swain v. Alabama*, supra, raised or otherwise altered the standard or kind of proof necessary to make a prima facie case of the systematic exclusion of Negroes from Grand and Petit Jury service is untenable. *Swain v. Alabama* merely reasserted the well-known principle of law that allegata without probata does not make out a case justifying relief and that the burden of proof or disproof cannot be so easily switched merely because the complaints happen to be members of a certain race.

II.

MERE PROOF THAT FEW NEGROES ACTUALLY *SERVED* ON GRAND AND PETIT JURIES DOES NOT MAKE OUT A PRIMA FACIE CASE THAT NEGROES WERE SYSTEMATICALLY EXCLUDED FROM THE JURY ROLLS AND JURY BOXES.

What was said with respect to our argument in connection with the Proposition No. I, above, applies with equal force to this Proposition. However, we would like to further emphasize that whatever may be the situation as far as the actual *service* of Negroes on Grand and Petit Juries in Jefferson County, Alabama, has no relation whatsoever to the fact that the Members of the Jury Board and the Clerk of the Jury Board of Jefferson County, Alabama, have conscientiously performed their duties without any hint of possible discrimination on racial grounds. On the other hand, the

Record demonstrates without question that the system employed by the Jury Board of Jefferson County, Alabama, in making house-to-house surveys is probably the most commendable system of jury selection of any that has been before the courts including the key man system which was discussed in the cases of *Rabinowitz v. United States*, No 21256 and *Jackson v. United States*, No. 21345 (as yet unreported, which were decided in a consolidated opinion of the Fifth Judicial Circuit Court of Appeals on July 20, 1966). 35 L. W. 2061.

III.

WHERE THE NAMES OF PERSONS PLACED ON THE JURY ROLLS ARE OBTAINED BY A HOUSE-TO-HOUSE CANVASS SYSTEM, AND NO RECORD OF THE RACIAL IDENTITY OF SUCH PERSONS IS MADE, THE JURY BOARD IS NOT REQUIRED TO PROVE SUCH RACIAL IDENTITY IN ORDER TO REBUT ALLEGATIONS OF RACIAL DISCRIMINATION AND SYSTEMATIC EXCLUSION.

Purposeful discrimination may not be assumed or merely asserted. *Brownfield v. South Carolina*, 189 U. S. 426, 47 L. Ed. 882, 23 S. Ct. 510; *Tarrance v. Florida*, 188 U. S. 519, 47 L. Ed. 572, 23 S. Ct. 402; *Smith v. Mississippi*, 162 U. S. 592, 40 L. Ed. 1082, 16 S. Ct. 900; *Bush v. Kentucky*, 107 U. S. 110, 27 L. Ed. 354, 1 S. Ct. 625. It must be proven. *Tarrance v. Florida*, supra; *Martin v. Texas*, 200 U. S. 316, 50 L. Ed. 497, 26 S. Ct. 338.

Several years ago and in some recent cases the complaint was made that jury rolls and jury cards contained some means of racial identification, and on the basis of such complaints this Court held in the famous Scottsboro cases that to main-

tain such a system was unconstitutional. *Norris v. Alabama*, 294 U. S. 587, 79 L. Ed. 1074, 55 S. Ct. 579; *Smith v. Texas*, 311 U. S. 128, 85 L. Ed. 84, 61 S. Ct. 164. Now, for some strange reason, attorneys in cases of this type are presently contending that the Jury Boards and Jury Commissions should maintain a record of racial identity of the persons considered as eligible for jury duty. Such an inconsistent position is not reasonable and should not be the subject of serious consideration by this or any other court, except that it apparently is being bruited about that the Negro race is at this time entitled to some favorable consideration or preferential treatment. This is not and should not and cannot be the *Law*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Leslie Hall, one of the attorneys for Respondent, and a Member of the Bar of the Supreme Court of the United States, hereby certify that on the 25th day of August, 1966, I served the requisite number of copies of the foregoing Brief in Opposition to Petition for Certiorari upon Charles Morgan, Jr., 5 Forsyth Street, N. W., Atlanta, Georgia 30303, Orzell Billingsley, Jr., Peter A. Hall, J. Mason Davis and Oscar W. Adams, 1630 4th Avenue, North, Birmingham, Alabama, Melvin L. Wulf, Jack Greenberg and Norman Amaker, 10 Columbus Circle, New York, New York 10019, attorneys for Petitioners, by depositing the same in the United States mail, first class postage prepaid and properly addressed to them at the addresses given.

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